INTRODUCTION

The unthinkable happens—you are arrested. You are taken to the police station, put in an interrogation room, and read your rights. We all know them from television by now:

You have the right to remain silent. If you choose to give up this right, anything you say can and will be used against you in a court of law. You have the right to consult with an attorney, and to have the attorney present during interrogation. If you cannot afford an attorney, one will be appointed to represent you. Do you understand these rights? Of course you do; you are a law professor, an attorney, a well-informed citizen.

"I demand to see my lawyer and refuse to answer any questions."
"Too bad, buddy, we're short on patience today. You're gonna talk to us without your lawyer."
"What? I demand to see my lawyer!"
"You have to comply."

(general laughter by officers present)

After hours of nonstop interrogation, one of five possible outcomes emerges: you are guilty and "spill your guts"; you are innocent but confess or make damaging admissions; you are guilty but have the exceptional fortitude to remain quiet; you are innocent and manage to remain silent; you are innocent and eventually convince the police to release you or at least end the interrogation. Except for the first two situations, in which you may have the limited remedy of having your statement excluded from the prosecutor's case-in-chief, there are no remedies available to you for the violation of

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The Supreme Court established the general substantive requirements for police officers in Miranda v. Arizona, 384 U.S. 436 (1966).

The introduction of a statement taken in violation of Miranda and/or the Self-Incrimination Clause will be allowed if it is later determined to have been harmless
your so-called "rights."

This Article will examine the Supreme Court's backpedaling on the warnings required by Miranda v. Arizona and how that decision's attendant exclusionary rule has affected both the manner in which investigations are conducted by police departments in this country and the remedies available to citizens who are subject to unlawful government conduct. I propose that current developments in Fifth Amendment jurisprudence actually encourage law enforcement officials to violate the standards of conduct imposed upon them by the Miranda decision, and that current developments in civil rights jurisprudence make impossible a successful action based upon a violation of either Miranda or the privilege against compelled self-incrimination. Thus, a "rational police officer in today's world" will (and often does) ignore the dictates of Miranda. This problem can be solved only if the Supreme Court reconstitutionalizes Miranda, at least to the extent necessary to enforce those restraints on state and federal officials that it initially found crucial to properly safeguarding an individual's Fifth Amendment privilege against self-incrimination. Failing this, the Court should cease promulgating prophylactic rules that it cannot or will not enforce, both to avoid losing institutional prestige and to curb the shift in constitutional interpretative authority from itself to the executive branches of state and federal governments.

In Part I, I detail the primary obstacles to enforcing Fifth Amendment values. First, I briefly describe the already well-documented evolution of the prohibition against compelled self-incrimination, which after reaching the pinnacle of protection in Escobedo v. Illinois, settled into its most balanced and modern

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5 This section is based loosely on one's agreement with the normative views underlying Miranda. Whether one believes that Miranda was asked decision that will have lasting effect on the constitutional criminal law to reveal our already-made secrets or that the Miranda warnings were a necessary obstacle in the path of an overly powerful State's ability to transcend an individual's dignity, it should be possible to reach agreement concerning whether, on any particular topic, the Court sought to issue commands that are not going to be followed.

6 See U.S. CONST. amend. V (stating that "no shall any person . . . be compelled in any criminal case to be a witness against himself").


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approach in Miranda v. Arizona. The Miranda decision altered the indispensible advantages of providing a "bright-line" rule for police officers to follow, aiding courts in adjudicating by presuming confessions to be valid when the prescribed warnings are given, and fairly evaluating the often competing interests of performing traditional law enforcement functions and protecting individual Fifth Amendment right of those suspected of committing a crime. I then trace the privilege's subsequent decline in what I term the Miranda decision's deconstitutionalization, a process that began almost from its inception and reached its nadir when the Department of Justice recommended that Miranda be overruled as an illegitimate act of judicial policymaking. There are now so many exceptions to Miranda's exclusionary rule that it makes more sense on a practical level to violate than to obey it. Additionally, if the Miranda decision truly has no constitutional mooring, the Court lacks authority pursuant to Article III of the United States Constitution to impose its mandates upon state actors.

Second, I outline the detrimental and perhaps unintended effect of this deconstitutionalization on versions brought against state and local officials, pursuant to the Civil Rights Act of 1871 (§ 1863)

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* See OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, TRUTH IN CRIMINAL JUSTICE, REPORT NO. 1, REPORT TO THE ATTORNEY GENERAL, ON THE LAW OF PRETENSIONS INTERROGATION (1986), reprinted in 22 U. MICH. J.L. REVT. 547-49 (1986) (hereinafter DEPARTMENT OF JUSTICE REPORT) (asserting that Miranda constituted a usurpation of legislative and administrative power, thinly disguised as an exercise in constitutional judgecraft, which rested on dicta and specious arguments). This report was written during the tenure of former Attorney General Edwin Meese and adopted by the subsequent Republican attorneys general. Although there has been no official declaration on this issue, I doubt that the report reflects the present position of the Department under Attorney General Janet Reno.

* Section 1863 states, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to be prosecuted in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.


Similar actions may be brought against federal officials. See Bowen v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 483 U.S. 599, 605 (1987) (holding that plaintiff could sue federal narcotics agents for injuries suffered through the agents' alleged violations of the Fourth Amendment). The analysis contained within the § 1863 case law and in this Article applies with equal force to these so-called
and based upon allegations of police-coerced confessions. I will briefly synopses and analyze most of the case law in this area from 1960 to the present. Those courts that allow a civil rights action based on an unwarned statement do so on the basis of Fourteenth Amendment substantive due process notions3 or on an expansive reading of the Fifth Amendment itself. Those courts that disallow a civil rights action based on unwarned confessions do so based upon one or more of the following considerations: (1) Miranda warnings are merely prophylactic rules, rather than constitutional prerequisites; (2) the Fifth Amendment cannot be violated unless a statement is used in a criminal proceeding; (3) the doctrine of collateral estoppel prevents relitigation of the voluntariness of a confession; (4) when a police officer testifies at a criminal trial, he is not acting under "color of law"; (5) law enforcement officials are not the proximate cause of the admission of coerced confessions; and (6) absolute or qualified immunity protects the government actors involved. I suggest that those courts that disallow these civil rights claims are more faithfully following Supreme Court standards. I further argue that the confluence of present legal doctrines bars virtually all § 1983 actions based on alleged violations not only of Miranda but of the Fifth Amendment itself.

In Part II, I outline the advantages of allowing some remedy for Miranda violations and discuss the consequences of failing to do so. Most important, the elimination of Miranda would seriously infringe upon personal liberties by shifting the responsibility for interpreting the Constitution from the judiciary to law enforcement officials. Additionally, permitting some remedy would vindicate federal rights and foster Miranda's symbolic value as an ideal to be integrated into the behavioral norms of law enforcement entities and as an expression of society's commitment to treat each member, even one charged with a heinous crime, with respect.

Finally, in Part III, I consider various avenues available to the Court to resolve the Inclusion Clause. Initially, I explore the possibility of basing a civil rights action upon either the deservedly maligned doctrine of substantive due process or a broader interpretation of the Fourth Amendment. I further suggest the more comprehensive solution of reconstitutionalizing Miranda and its exclusionary rule, either by true constitutional interpretation of the underlying guarantees of the Fifth Amendment or by recognizing and reining a concept of "constitutional common law" that may be only conditionally or temporarily required. Each of these solutions would permit some or all of the following remedies for a Miranda violation: the exclusionary rule applied solely to the prosecutor's case-in-chief, the exclusion of all collateral uses of such evidence, and money damages or injunctive relief. I conclude that although the legal and policy arguments against traversing these avenues are sound, they cannot ultimately prevail, lest the Court be unable to discharge its role as the ultimate interpreter of the Constitution in the Fifth Amendment and other vital areas.

1. OBSTACLES TO ENFORCEMENT

There are two primary obstacles to enforcement of the Self-Incrimination Clause. The first is the Court's deconstitutionalization of the Miranda warnings. Initially, this change permitted gradual inroads into Miranda's exclusionary rule. Each inroad allowed greater use of statements taken in violation of Miranda and hence made it more attractive to violate the rule. Eventually, prosecutors and legal scholars began to argue that Miranda was itself an illegitimate decision and that the Court had no authority under Article III of the Constitution to promulgate Miranda's exclusionary rule or, in fact, any prophylactic rules. Such reasoning has emboldened certain Court members and Justice Department officials to advocate overruling Miranda entirely or utilizing a largely ignored federal statute10 to evade its requirements. The second obstacle to protecting the privilege against self-incrimination

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10 This phrase was coined by Henry P. Monaghan. See Henry P. Monaghan, The Supreme Court 1974 Term—Foreword: Constitutional Criminal Law, 80 HARV. L. REV. 1 (1975). According to Monaghan, a surprising amount of what passes as authoritative constitutional "interpretation" is best understood as nothing of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from ... various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.

11 Id. at 2-8. Much of the analysis contained in part III.C of this Article has its genesis in Professor Monaghan's groundbreaking work.

12 See Milk v. Sprewell, 5 U.S. (1 Cranch) 137, 146-47 (1805) (holding that Article III of the Constitution gives the Court the power to make authoritative determinations of constitutional law, and thus the Court has the power to declare acts of Congress unconstitutional).

concerns the development of Fifth Amendment and civil rights jurisprudence in a manner as to exclude any possible damage action for violation of either the Miranda dictates or the Self-Incrimination Clause itself.

A. Miranda's Deconstitutionalization

Up until the early 1960s, the admissibility of a defendant's statements in a criminal trial in state court depended upon an assessment of the "totality of the circumstances" to determine whether the confession was the product of an essentially free and unconstrained choice by the maker.66 If it was not, the introduction of such a statement violated the Due Process Clause of the Fourteenth Amendment.67 The Court looked to such factors as the conduct of the police in intimidating the suspect and the characteristics of the suspect that might make him susceptible to coercion, such as his age, intelligence, education, psychological problems, and physical limitations.68

This standard was modified by three events occurring in the mid-1960s. First, the Fifth Amendment's privilege against self-incrimination was incorporated into the Fourteenth Amendment and made applicable to the states.69 Second, the Sixth Amendment's right of assistance to counsel was extended pre-indictment to mere police interrogation of a "prison suspect,"

66 See note 15 and accompanying text.
67 The admissibility of confessions in federal court was and is regulated by the Fifth Amendment. See Brass v. United States, 168 U.S. 352, 357 (1897) (holding that a defendant's confession in incompetent manner was voluntary ... it is controlled by that portion of the Fifth Amendment ... commanding that no person 'shall be compelled' in any criminal case to incriminate himself against himself.
68 See, e.g., Lewis v. Washington, 373 U.S. 503, 507 (1963) (concerning a suspect who was not allowed to call his wife until after he had confessed); Spano v. New York, 368 U.S. 315, 327 (1961) (concerning a suspect who was denied medical care); Payne v. Arkansas, 356 U.S. 560, 564-65 (1958) (concerning a suspect who was promised protection against an angry mob outside the jailhouse through a lie); Brown v. Mississippi, 297 U.S. 278, 284-85 (1936) (concerning suspects who were tortured by officers until they confessed). As examples of the different results, the constitutional test mandated during this time period from inquiring whether there was compulsion by torture to whether it was the accused's free choice, to frame or refuse to answer. See Spano, 368 U.S. at 521 ("[w]e have found, as have the courts, that the presence of a police officer in the interrogation room ... is only as severe as the more definite and explicit kind of the words 'to tell them anything you want to tell them ... to the police officer who ... to a police officer who ... to the police officer who ... to the police officer who ... to the police officer who ... to the police officer who ... to the police officer who ... to the police officer who ... to the police officer who..."
69 See Malley v. Hogan, 398 U.S. 1, 8 (1966).

although for only a brief time.70 Finally, the principles embodied in the Fifth Amendment's protection against compulsory self-incrimination were implicated by statements taken from suspects during custodial interrogations.71 It was the third event that precipitated the requirement that police officers recite the warnings quoted in the first paragraph of this Article.

Although now limited to its peculiar facts,72 at the time Escobedo v. Illinois was decided, many commentators feared that its sweeping language regarding the need for counsel before confessions are taken73 and its attack on the use of confessions in general74 preaged that development of a new rule that would bar both uncoached confessions and volunteered statements, thus effective- ly eliminating interrogations.75 Instead, two years later in Miranda, the Court specifically permitted volunteered statements, general on-the-scene questioning before a suspect is taken into custody, and in-custody interrogation after the required warnings) based upon an uncoached waiver.76 Despite the objectionable police interrogations that remained to be employed under the old "voluntari-
test” in the Fifth Amendment.20

20 See, e.g., Lisenb v. California, 314 U.S. 219, 240-41 (1941) (holding that despite law enforcement officers’ normal and necessary self-preservation during questionable restraint of violent demonstrator); Brown v. Mississippi, 297 U.S. 278, 285 (1936) (holding that restraint in pursuit of criminal suspect was not “tactless and voluntary.”)

21 MIRANDA, 384 U.S. at 467.

22 At 465. The Miranda Court devoted much of its opinion to outlining the abuses suffered by suspects during "interrogating police procedures." At 467. The Court described these abuses through the finding of the Constitution on Civil Rights that "some policemen still resort to physical force to obtain confes-
sion." The Court also cited to state cases in which such practices as muzzling a defendant, stripping a completely nude defendant to the waist, forcing a defendant to submit to a lie detector test when he needed to use the toilet, and depriving defendants of food and sleep were permitted. See id. at 466 n.7. Finally, the Court reviewed police manuals that advocated deception and the creation of feelings of fear and hopelessness. See id. at 448-55.

23 Id. at 468.

24 See, e.g., Moran v. Burbine, 475 U.S. 412, 423-424 n.8 (1986) (noting that "the [Miranda] decision . . . embodies a carefully crafted balance designed to fully protect both the defendant’s and society’s interests"); Laurence A. Berry, Trenton: Remembering the "Right of Privacy: A Reply to Professor Johnson,” 146 Mich. L. Rev. 537, 579 (1996) (arguing that “the Miranda Court sought to strike a balance between the interest of the police and the rights of society”); MIRANDA, 384 U.S. at 492 (asserting that "the American state, like that of any other sovereign, has an interest in the stability and security of the social order which is directly linked to the effective operation of the criminal justice system."); Stephen J. Schulhofer, Reexamining Miranda, 54 U. Chi. L. Rev. 470, 494 (1987) ("[T]he Court’s decision in 1966 . . . was designed to strike a balance between the rights of the criminal defendant and the interest of society."); see also Malloy v. Hogan, 378 U.S. 1 (1964) (similarly acknowledging that a "self-incriminating regulation" is an official mandate that is "susceptible of correct and adequate application by a person to whom it is initially addressed").

25 The benefits of drawing bright-line rules for police officers has been recognized by the Court and commentators. See, e.g., New York v. Betts, 358 U.S. 175, 180 (1958) ("[T]he benefits of bright-line rules are obvious. They (a) simplify and speed the work of the police; (b) warn the police to avoid what the courts have defined as illegal procedures (so that a police officer who has no actual knowledge of the rules knows he cannot escape liability by showing his innocence); (c) of course, give rise to a greater number of false detentions . . . ."); see also MIRANDA, 384 U.S. 470-71 (asserting that the Court’s emphasis was "the need to give the police a clear, specific mandate that is open to no misinterpretation."); see also Wayne R. LaFave, The Fourth Amendment in an Impacted World: On Drawing "Bright Lines" and "Good Faith," 85 U. Pitt. L. Rev. 14, 15-16 (1984) (warning that "the police must feel that the courts are seriously enforcing the rules, which, in turn, gives the police a chance to understand and observe them").

26 See MIRANDA, 384 U.S. at 608-10 (tracing the roots of the privilege against self-incrimination from ancient times).

27 The Court believed that this innovation upon police conduct is the only "assurance that practices of this nature [the unidisciplinary coercive tactics used during custodial interrogations prior to Miranda] will be eradicated in the foreseeable future."
allowing the judiciary to monitor more closely these officer/citizen interactions by providing a model against which all custodial interrogations could be measured, rather than adjudicating each interaction on a case-by-case basis.\footnote{Miranda, 384 U.S. at 417.}

While many passages in the decision assume the Miranda warnings have constitutional stature, the holding itself was a narrow one: statements obtained in violation of the warnings are inadmissible as part of the prosecutor's case-in-chief in a criminal trial against that defendant.\footnote{See, e.g., Grgurevich, supra note 38, at 1320 (noting that "[j]ust in time... decisions... are... of the utmost importance in the context of custodial interrogation").} The Court did appear to hold, however, that the Fifth Amendment applies at the station house and that the defendant must be apprised of his right to remain silent and to have a lawyer present.\footnote{The Burger and Rehnquist Courts later interpreted the Miranda holding as a mere prophylactic measure and made clear that a violation of Miranda does not equal a constitutional violation.\footnote{See, e.g., Michigan v. Tucker, 402 U.S. 482, 500 (1971); the defendant's statements were excluded at trial due to an incomplete Miranda warning, yet the trial judge admitted the testimony of a witness of whom the State became aware solely through the excluded statements of the defendant.\footnote{The Court noted that: "Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in Miranda. The question for decision is how sweeping the judicial disavowal of Miranda, this rule of admissibility, which requires no warnings or other mechanisms to ensure voluntariness, appears to me to fail to offer an "adequate" alternative safeguard. The Department of Justice has not found it appropriate to argue that voluntary statements taken in violation of Miranda be admitted pursuant to its principles. But cf. United States v. Greathouse, 519 F.2d 1120, 1337-38 (10th Cir. 1975) (rejecting defendant's argument that the district court erred in applying the more lenient standard of § 3501 and finding full compliance with Miranda and § 3501 constitutional). The Court viewed 384 U.S. at 442 ("[w]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent complexities of the custodial interrogations process as it is presently conducted."); and 402 U.S. at 494 (the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to assure the privilege against self-incrimination.").} The evidence at trial, which included the defendant's statements after the Miranda warning, was admissible.\footnote{The Court reviewed 384 U.S. at 448 ("We wish to make it plain that the Fifth Amendment privilege is available outside of criminal court proceedings... The evidence of... the investigator's impartiality in taking and examining the confession... is an essential prerequisite in overcoming the inherent pressure of the interrogation atmosphere.").} The defendant was at all times free to stop questioning if he saw fit; the police were not required by the Fifth Amendment to stop the questioning.\footnote{See, e.g., Michigan v. Tucker, 402 U.S. 482, 500 (1971) (noting that "[j]ust in time... decisions... are... of the utmost importance in the context of custodial interrogation").} The Court noted that: "Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in Miranda. The question for decision is how sweeping the judicial disavowal of Miranda, this rule of admissibility, which requires no warnings or other mechanisms to ensure voluntariness, appears to me to fail to offer an "adequate" alternative safeguard. The Department of Justice has not found it appropriate to argue that voluntary statements taken in violation of Miranda be admitted pursuant to its principles. But cf. United States v. Greathouse, 519 F.2d 1120, 1337-38 (10th Cir. 1975) (rejecting defendant's argument that the district court erred in applying the more lenient standard of § 3501 and finding full compliance with Miranda and § 3501 constitutional). The Court viewed 384 U.S. at 442 ("[w]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent complexities of the custodial interrogations process as it is presently conducted."); and 402 U.S. at 494 (the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to assure the privilege against self-incrimination.").}
imposed consequences of this disregard shall be. This Court said in Miranda that statements taken in violation of the Miranda principles must not be used to prove the prosecution’s case at trial. That requirement was fully complied with by the state court here: respondent’s statements, claiming he was with Heiferman and then asleep during the time period of the crime were not admitted against him at trial. This Court has also said, in Wong Sun v. United States, 371 U.S. 747 (1963), that the “fruits” of police conduct which actually infringed a defendant’s Fourth Amendment rights must be suppressed. But we have already concluded that the police conduct at issue here did not abridge respondent’s constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in Miranda to safeguard that privilege.55

Miranda’s standing even as a prophylactic rule has been under-
cut in a series of more recent cases. The deepest incision to date is the public safety exception,56 which permits a prosecutor to use, in his case-in-chief, statements taken in direct violation of the Miranda requirements. In New York v. Quarles,57 police officers pursued an armed robbery suspect into a supermarket, where he was frisked and found to be carrying an empty shoulder holster. After handcuffing the defendant, the pursuing officers asked him the location of the gun. After the defendant answered, the police officer retrieved the gun, formally arrested the defendant, and read

54 Id. at 455-46 (emphasis added); accord Carr v. Barret, 479 U.S. 325, 329 (1987) (describing Miranda’s rule that once an accused expresses his desire for an attorney the interrogation must cease until the attorney is present). The lower court stated that “the prohibition on further questioning—like other aspects of Miranda—is not itself required by the Fifth Amendment’s prohibition on coerced confessions, but is instead, an attempt to accord to it its prophylactic purpose.” Id. The court went on to hold that the Constitution did not require suppression of defendant’s incriminating statements where defendant, after Miranda warnings, stated his willing-
ness to speak to police verbally, but expressed his unwillingness to make a written statement. (The Miranda rule is one of counsel. See id. at 520; see also McColl v. Wisconsin, 501 U.S. 171, 179 (1991) (stating that Miranda’s warning requirement is not a disincentive to the Fifth Amendment itself but a prophylactic rule).) Michigan v. Harvey, 494 U.S. 344, 350 (1989) (same); Duckworth v. Eagen, 492 U.S. 188, 203 (1989) (same).

55 Two stars have enacted a similar exception, called the “recess doctrine,” which states that “evasive circumstances may excuse compliance with the Miranda rules in instances of everybody needing to save human life or to rescue persons whose lives are in danger.” People v. Riddle, 85 Cal. App. 3d 585, 574 (1979) (affirming police to interview a suspected kidnapper regarding location of victim), cert. denied, 440 U.S. 957 (1979); State v. Prowant, 490 N.W.2d 99, 96-97 (Iowa 1992) (permitting police to question suspect in order to find burglary victim), cert. denied, 113 S. Ct. 1500 (1993).


57 At 655 & n.5. The relevant circumstances were the combination of the danger presented by the gun, which was concealed somewhere in a public supermarket where a customer, employee, or accomplice might make use of it, with the possibility that the Miranda warnings would deter Quarles from responding to the officer’s question about the location of the gun. See id. at 657. The Court noted that there was no claim that the defendant’s statements were “actually compelled” by police conduct, see id. at 654 (emphasis added), and reminded defendant that he was “free to remind the officer that his statement was coerced under traditional due process standards.” Id. at 656 n.5.

58 See Michigan v. Tucker, 454 U.S. 730, 743, 454-46 (1977) (noting that Wang Sun does not apply to exclude evidence obtained as a result of an inadvertent disregard of Miranda where the underlying police conduct infringes a nonconstitutional prophylactic rule only).

59 See, e.g., Oregon v. Hass, 420 U.S. 714, 716-18 (1975) (holding that statements taken by a police officer who questioned a defendant after he was requested an attorney, but before the attorney could be contacted, can be used in a criminal trial to impeach such defendant, should he take the stand); Harris v. New York, 401 U.S. 222, 224 (1971) (holding that statements taken from defendant without informing him of his right of access to appointed counsel could be used to impeach the defendant’s direct testimony at trial provided that the testimonial nature of such statements satisfies legal standards).

60 A proviso may not, however, our defendant’s citation after Miranda warnings as evidence of his sanity. See Wisconsin v. Greenfield, 474 U.S. 284 (1986) (holding that the proviso’s use of respondent’s post-arrest, post-Miranda warnings silence as evidence of sanity violates the Due Process Clause). Nor may a proviso use statements in the court-ordered psychiatric examination where the Miranda warnings were not delivered and waived. See Estelle v. Smith, 451 U.S. 477 (1981).
An initial unwarned confession does not "tain" a subsequent confession made after proper Miranda warnings. Criminal convictions will not be overturned despite the admission of a confession taken in violation of an accused's Miranda rights if the government establishes harmless error. Finally, in a bold and sudden move disdosing years of tradition, Chief Justice Rehnquist, writing for a free-jusus majority, held that a violation of the Self-Incrimination Clause itself does not require a new trial if that error was "harmless."
Court actually ruled as it did because otherwise there would be no federal court review, aside from a direct appeal from the highest state court to the U.S. Supreme Court via a certiorari petition, to ensure that state courts and police followed the dictates of Miranda. 60 The Court realized the general danger of promulgating unenforced prophylactic rules and the specific danger to the privilege against self-incrimination posed by unwarned custodial interrogations but was unwilling or unable to countenance the tougher and more divisive issue regarding its actual authority. Resolving this issue, in my opinion, requires either overruling Miranda or reconstituting it.

The Justice Department and the Court have sidestepped this same issue arising in a different context by refusing to rule on the constitutionality of 18 U.S.C. § 5501(a), an unused federal statute enacted in 1968, which calls for admissions of confessions in federal court cases if voluntary, regardless of whether Miranda-type warnings were given. 61 The Department of Justice under President Clinton specifically declined to raise this statute in a case last term concerning a statement admitted in a United States Court of Military Appeals, allegedly in violation of a sailor's Miranda rights. 62 In a concurring opinion, Justice Scalia announced his intention, in the next federal case involving a confession, to rule on this statute's constitutionality, regardless of whether the Executive chose to invoke it. 63 If the Department should choose to advance

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60 See Weibro, 115 S. Ct. at 1752 (citing Brief for United States as Amicus Curiae at 14-15) (examining the Court's conclusion that habeas review should not extend to a claim that a state constitution rests on statements in obtained in the absence of Miranda safeguards because those safeguards are not constitutional but merely prophylactic). A violation of federal common law would also support a habeas corpus petition, and arguably could be the basis of a § 1983 suit. The Court, however, has never held that Miranda is a product of federal common law. For a variant of this position, see part III.C.


62 Id. at 1754-55 (O'Connor, J., concurring in part and dissenting in part) (noting that the question is whether violations of Miranda's prophylactic rules, which are in the nature of evidentiary claims, should be cognizable on habeas review). The argument that there should be no habeas because "there is no constitutional harm to remedy," id. at 1761, applies equally to the Supreme Court's authority to review a Miranda violation on direct appeal via a petition for certiorari.

63 This reading was based on the perceived differences between the Fourth Amendment's exclusionary rule as outlined in Mapp v. Ohio, 367 U.S. 643 (1961) and the Fifth Amendment's exclusionary rule articulated in Miranda v. Arizona, 384 U.S. 436 (1966). In contrast to Mapp, the Court held that Miranda safeguards a fundamental constitutional right to protecting a defendant's privilege against self-incrimination and facilitates the correct ascertainment of guilt by guarding against the use of unreliable statements at trial. The Court also noted that refusing to do so would advance the cause of federalism - i.e., provide the burdens on the federal court, as every thwarted Miranda claim would require a hearing as a due process voluntariness claim. See Weibro, 115 S. Ct. at 1755 ("We thus fail to see how abridging Miranda's bright line rule, which, we would do much of anything to lighten burdens placed on busy federal courts.")
this statute, or if Justice Scalia can convince a majority of other Justices to rule on the statute despite the Department's wishes, the question of Miranda's pedigree will soon be forced upon the Court.

B. Impossibility of Enforcing the Fifth Amendment via § 1983 Actions

Given the Court's current interpretation of the Miranda decision, a violation of its safeguards should not constitute the basis of a § 1983 action. Since the Miranda warnings are not themselves constitutional mandates, it follows a fortiori that a failure to adhere to them cannot constitute a constitutional violation. Without a violation of the Federal Constitution or federal statutes, a § 1983 claim is groundless. Moreover, the combination of various Court decisions concerning doctrines associated with civil rights actions has made it virtually impossible to successfully bring a § 1983 action for a violation of the Self-Incrimination Clause. The vast majority of courts hearing the issue have held that a Miranda violation is not a proper basis for a § 1983 claim. A few courts have denied summary judgment for the defendants in such suits, however, based upon rather strained readings of Court opinions.

1. Cases Denying a § 1983 Action

Is what some commentators have characterized as outright hostility to § 1983 lawsuits, courts have developed a myriad of legal and policy arguments to justify the dismissal of such actions, finding no constitutional violation, invoking prosecutorial immunity, finding that the official did not act under color of state law, or all three. 20

the Executive declines to insist that we observe them.

Id. at 2958.

20 See, e.g., Mane v. Thiboutot, 448 U.S. 261, 267 (1980) (holding that § 1983 creates a cause of action against state officials); Ex parte Yarbrough, 321 U.S. 111, 115 (1944) (holding that the habeas corpus statute is only available for habeas corpus proceedings); Carvey v. Phipps, 465 U.S. 386, 396 (1984) (holding that the basic purpose of a habeas corpus statute is to provide habeas corpus relief for prisoners confined pursuant to proceedings involving deprivation of constitutional rights). See M. Bernick, supra note 10, at 1221 (explaining that habeas corpus is a habeas corpus statute is only available for habeas corpus proceedings).

21 See, e.g., Triplett v. Anderson, 470 F.2d 819 (6th Cir. 1972). Ernest Triplett was arrested, involuntarily committed to a mental hospital, and given large doses of the hypnotic drug Sodalene and sodium amytal to keep him at the institution. Shortly thereafter, Triplett confessed to a murder, and his confession was taped. The prosecutor, Donald O'Brien, obtained the taped confession by means of an Iowa state court order. After it was determined that the murder occurred in Plymouth County rather than Woodbury County, the case was transferred to two other prosecutors. In June of 1955, the Plymouth County prosecutors played the taped confession for the jury, and Triplett was convicted of murder. Triplett later brought a federal habeas corpus action. The court held that Triplett's conviction was obtained in violation of due process and ordered an evidentiary hearing. The Plymouth County court ruled that the confession was given involuntarily and ordered Triplett's release in October of 1972, 17 years after his conviction. See id. at 821-22. Triplett then commenced a civil action against prosecutors O'Brien pursuant to § 1983, which the district court dismissed on the ground that Triplett failed to state a claim upon which relief could be granted. See id. at 822. O'Brien's procurement of the tape constituted no violation of appellant's constitutional rights since he acted under color of state law to suppress the disclosure of the confession at trial. See id. at 823. Likewise, O'Brien did not use the confession in such a way as to deprive appellant of his constitutional rights because O'Brien did not poison the case, and O'Brien did not conceal or withhold information from the prosecution who did. See id. at 824. Furthermore, O'Brien's failure to come forward with exculpatory information as appellant's trial or otherwise was not an act under color of state law and therefore could not serve as the basis of a § 1983 action. See id. at 824.

22 445 F.2d 1290, 1293 (10th Cir. 1975).

Id. at 1293.
his Miranda rights prior to the custodial interrogation concerning the murder.

The district court denied Bennett's motion to proceed with his § 1983 action on the ground that the action was frivolous, and the appellate court affirmed. 56 In responding to the charge that Adams's failure to warn Bennett of his Miranda rights violated the Fifth Amendment, the court noted that even assuming Bennett's confession should have been excluded from evidence at his trial, there was no basis for a civil rights claim for damages:

The Constitution and laws of the United States do not guarantee Bennett the right to Miranda warnings. They only guarantee him the right to non-coercive self-incrimination. The Miranda decision does not even suggest that police officers who fail to advise an arrested person of his rights are subject to civil liability; it requires, at most, only that any confession made in the absence of such advice of rights be excluded from evidence. 57

The Eighth Circuit extended this analysis to instances in which the defendant's invocation of the rights supposedly secured by Miranda was not honored. In Warren v. City of Lincoln, 58 plaintiff Jackson Warren alleged certain dismissals and jury verdicts for

56 See id. at 1984.
57 See id. at 1265. For a factually similar case reaching the identical decision, see, for example, Williams v. Tyson, 610 F. Supp. 1083, 1086 (E.D. Pa. 1985). The plaintiff in Williams filed a § 1983 action, alleging that two police detectives arrested him because of his interracial marriage, searched his house and seized belongings without a search warrant, failed to provide Miranda warnings, refused his request to be placed in a holding area, and prejudiced themselves in his criminal trial. The district court granted the defendants' motion to dismiss, reasoning that since the warnings required by Miranda are not constitutional rights but measures designed to protect against compulsory self-incrimination, failure to give warnings did not subject the defendant to § 1983 liability. See also Thornton v. Buchmann, 392 F.2d 870, 874 (7th Cir. 1968) (holding that statements made by a defendant who had not been Mirandaized would be inadmissible only if finding no violation of the defendant's constitutional rights). Turner v. Lynch, 554 F. Supp. 486, 490 (E.D.N.Y. 1983) (dismissing plaintiff's § 1983 claim against police officers who allegedly failed to advise the defendant of the established principles of the Miranda warning and holding that plaintiff's note remedy was an exclusion of evidence for periods of up to eight hours per arrest, a plea agreement, and the inability to counsel his attorney as a basis for the exclusion of evidence at trial). See also Clark v. Clark, 118 F. Supp. 2d 1201, 1217 (D. Kan. 2000) (holding that exclusion of evidence at trial).

58 Id. at 1983.
59 See id. at 1265.
60 Id. at 1264. The court in Chirico v. Shafman, 507 F. Supp. 1512 (D. Del. 1980) reached a similar conclusion. The plaintiff, Willie Chirico, a former officer of the Wilmington Police Department, brought a civil rights action against Carl Williams, Delaware State Police Officer, and Milton Shafman, a former Delaware Deputy Attorney General, for alleged violations of his constitutional rights during the course of an internal investigation. After Williams and Shafman interviewed Chirico on six different occasions and discovered his wife was pregnant, a plea agreement was reached which resulted in Chirico's reduction of rank in patrolmen with no criminal charges filed. See id. at 1264. Chirico alleged, inter alia, that he was prevented from leaving during the final interrogation session, was not given Miranda warnings, and was not permitted to have an attorney present or to discuss the conversations with his attorney. See id.

The court held that these allegations, standing alone, did not give rise to a damages action for violation of the Fifth Amendment because "the right to Miranda warnings and the right to have counsel present during custodial interrogation are not
The Warren-type cases, however, can be distinguished from the Pennoyer-type cases. In the latter cases, the police failed to warn the defendants of their Miranda rights, whereas in Warren the police outright refused to honor the defendant's request to speak to an attorney. The Warren court, however, having already held that there was no Fifth Amendment right to an attorney stemming from Miranda, held that there had been no Sixth Amendment violation because the right to counsel had not yet attached. Although the reasoning used by the Warren court logically follows from the reasoning used by courts in failure-to-warn cases, there is something particularly unseemly and disturbing about its extension. One can excuse the state action in the failure-to-warn cases as the product of forgetfulness or negligence. But when the police warn a suspect of his Miranda rights and then refuse to abide by their own recitation of these rights, it is impossible to ascribe an innocent motive to their conduct.

The consequence of a court's holding that a Miranda violation is not a constitutional violation is that a plaintiff in a civil rights case must prove that her confession was actually involuntary in the due process sense. A failure to deliver Miranda warnings, or even a failure to honor a suspect's invocation of these rights, does not necessarily or even generally establish that his will was overcome.

Independent constitutional rights. Rather, they are 'procedural safeguards ... devised to inform accused persons of their right of silence and to assure continuous opportunity to exercise it.' At 1517 (citation omitted). As in Chavez's right-to-counsel claim, the court held that there was no Sixth Amendment violation because no trial proceedings had yet begun. See id. at 1519. Thus if Chavez had a right to counsel during questioning, it stemmed from the Fifth Amendment procedural safeguards required by Miranda. But Miranda recognizes a right to counsel during custodial interrogation only because the presence of counsel is "the adequate protective device necessary to make the process of police interrogation conform to the Acts of the privilege. The presence would assure that statements made in the government-established atmosphere of the prison do not become confessions." Miranda v. Arizona, 384 U.S. 436, 466 (1966).

Thus the Chavez court concluded that "[t]he same reason that there is no action for damages for failure to advise of Miranda warnings is no action for denying access to counsel during custodial interrogation." Chavez, 507 F. Supp. at 1321.

The privilege against self-incrimination is a constitutional right that prohibits the government's grant of immunity to a defendant providing the use and derivative use of a compelled statement in a subsequent criminal trial in circumstances that are comparable with the privilege against self-incrimination.

The privilege against self-incrimination has been held applicable in various contexts. See, e.g., In re Gult, 387 U.S. 1 (1967) (holding that the privilege is applicable in habeas proceedings); Mallon v. Hogan, 378 U.S. 411 (1964) (statutory proceeding); Waldin v. United States, 355 U.S. 194 (1957) (Congressional investigations); McCarty v. McCaney, 305 U.S. 56 (1939) (civil proceeding); Grintzler v. Hitchcock, 142 U.S. 547 (1997) (grand jury proceeding). The cases all involved sworn testimony.

The privilege against self-incrimination was held applicable in various proceedings. See, e.g., In re Gult, 387 U.S. 1 (1967) (holding that the privilege is applicable in habeas proceedings); Mallon v. Hogan, 378 U.S. 411 (1964) (statutory proceeding); Waldin v. United States, 355 U.S. 194 (1957) (Congressional investigations); McCarty v. McCaney, 305 U.S. 56 (1939) (civil proceeding); Grintzler v. Hitchcock, 142 U.S. 547 (1997) (grand jury proceeding). The cases all involved sworn testimony.
A number of courts have reached similar conclusions in the § 1983 context. For example, in Davis v. City of Charleston, the court held that police officers' failure to give Miranda warnings did not deprive a suspect of his constitutional rights because the statements obtained during custodial interrogation were not used against him at trial. Likewise, in Ransom v. City of Philadelphia, the court held that unless and until some use is made of an illegally obtained confession in such a way as to deprive a person of constitutional rights, no claim is stated under the Civil Rights Act. Plaintiff may have to await the outcome of his state court criminal proceedings before he may base a claim upon the allegedly improperly obtained confession.

These two bars on a § 1983 action based upon a Miranda violation—that such a violation is not a constitutional one and that the Self-Incrimination Clause can be violated only in a criminal proceeding—were recently combined in a Ninth Circuit opinion. In Cooper v. Dupnik, plaintiff Clarence Cooper brought a § 1983

407 F. Supp. 517, 521 (E.D. Wash. 1975), rev'd, 917 F.2d 1502 (9th Cir. 1990) (reviving only the award of attorney's fees to police officers).


969 F. Supp. 173 (E.D. Pa. 1991). After reaching this conclusion, the court granted judgment on the pleadings to the defendants. See id. See also Coltrane v. Shadnaw, 507 F. Supp. 3512, 1972 (D.D.C. 1983). The Obihe court held that the defendant's due process right against use of his laboratory statement came late only in the context of a criminal proceeding. See id. at 1310. Thus, the court held that neither Fourth or Sixth Amendment issues, in the Fifth Amendment context the exclusion of the incriminating statements is itself the constitutional right, not the remedy for a constitutional violation. See id. at 1317.

Professor Arnold Lourie suggests not only that a Miranda violation can never provide the basis for a § 1983 action but that sound public policy may dictate that police officers be excused from giving Miranda warnings or to ignore the warnings they give. See Arnold H. Lourie, Police Obtained Evidence and the Constitution: Disregarding Unconstitutional Obtained Evidence From Unconstitutionally Obtained Evidence, 87 Mich. L. Rev. 927, 923 (1989). Lourie points out that the Miranda doctrine mandates exclusion of evidence not because the evidence was unconstitutionally obtained and exclusion is desirable to deter police behavior, but because the defendant has a procedurally fair and inculpatory use, which is excluded at trial. See id. at 917. Thus, "courts should not care whether or not Miranda is violated as long as no evidence obtained from the violation is introduced against the person from which it was obtained. Similarly, no police officer should be subject to a law suit for obtaining a confession in which Miranda is violated."


The Honorable Constance Holcomb Hall wore the original panel's decision in Cooper I. The author served as a judicial law clerk for Judge Hall at that time. The action against the Pima County Sheriff's Department and the Tucson Police Department alleging, inter alia, a violation of his Fifth Amendment right against compulsory self-incrimination and his Fourteenth Amendment right to substantive due process. The series of rapes, robberies, and kidnappings had occurred from 1984 to 1986 in the Tucson area. These crimes received considerable media attention; the suspect was dubbed the "Prime Time Rapist." A joint task force of the Tucson Police Department and the Pima County Sheriff's Department determined prior to Cooper's arrest that they would continue to question any suspect in this particular case despite his request for silence or for an attorney. In fact, there was evidence that these two law enforcement agencies had been disregarding defendants' requests for counsel, at their discretion, since 1981.

Cooper was arrested after a Tucson Police Department identification technician reported (orally) that two sets of latent prints found at the scenes of two of the Prime Time Rapist's crimes were identified as belonging to Cooper. The head of the police department's identification laboratory later rescinded this report, admitting that it was incorrect. The officers Mirandized Cooper

opinions expressed in this Article do not necessarily reflect the opinions of Judge Hall.

Cooper additionally alleged nine counts under state tort law, including false arrest, malicious prosecution, defamation, false-light invasion of privacy, intentional infliction of emotional distress, trespass, conversion, negligence, and conspiracy. See Cooper I, 924 F.2d at 1223 n.4. These state law claims were dismissed, and were not at issue in the federal appeal.

Cooper also brought a federal action for defamation, which was held proper by the California court and is still pending. See id. at 1315-17. Cooper v. Dupnik, supra at 1223. Finally, Cooper brought § 1983 counts for false arrest, false imprisonment, and improper training and procedures, which the district court upheld in a summary judgment proceeding against the appellants' assertions of qualified immunity. The ruling on those counts was not appealed by the Pima County or City of Tucson appellees. See Cooper I, 924 F.2d at 1225 & n.5. See Cooper I, 924 F.2d at 1229.

Cooper v. Dupnik, supra at 1223.

See id. See id. See id. See id. at 1315-17. Officers from these agencies understood that statements obtained in violation of Miranda would be inadmissible in a criminal trial. They believed, however, that such statements might be held voluntary and thus could be used to impeach the defendant, to keep him off the stand, or to deprive him of an insanity defense. See id. at 1324.

The police later explained that this decision was based on a psychological profile indicating that the rapist was "case-shy," and would demand an attorney during an interrogation. See id. at 1315-17.
at his probation office and conducted a pre-arrest interview. During this interview, the officers told Cooper that his prints matched those found at the scene of the two crimes, which they believed to be true, and that his prints matched those found at another Prime Time Rapist crime scene, which they knew to be false.107 After half an hour, the officers placed Cooper under arrest. He then made his first unequivocal request to speak to his attorney.108 The officer denied this request.109

Cooper was transported to the Pima County Sheriff's Department where he was interrogated for approximately four hours by Detective Wright of the Tucson Police Department and Detectives Barkman and Hunt of Pima County.110 All participating officers were aware that Cooper had requested an attorney and that they were violating Miranda in refusing to honor that request.111 During the interrogation "Cooper was visibly upset, sometimes angry and crying."112 Detective Barkman made certain derogatory references to Cooper's Judaic background and questioned him about his sexual practices with his wife.113

Cooper was booked into the Pima County Jail that evening.114 He made another request for counsel, which was again ignored.115 Thus, Cooper had no contact with either an attorney or his family until the following afternoon when he was released. This release occurred after Tucson's Chief of Police learned that the fingerprints in issue did not belong to Cooper, that the people who had allegedly seen the Prime Time Rapist did not identify Cooper, and that the police department had no grounds to charge Cooper with any crime.116 Cooper's psychologist testified at the summary judgment hearing that Cooper was traumatized by the interrogation and suffered from post-traumatic stress syndrome.117 The police never filed any charges against Cooper for the crimes of which he was accused.118

In Cooper's subsequent § 1983 action against the two police departments, the district court denied the defendant's qualified immunity. On appeal, the Ninth Circuit reversed, holding that the police department's failure to honor Cooper's request to remain silent and to speak with an attorney after they Mirandized him could not establish a Fifth Amendment violation.119 The Cooper I court stated that [t]he Miranda warnings and rights are not themselves constitutionally mandated, but are rather procedural safeguards, or prophylactic measures, to ensure that the Fifth Amendment right against compulsory self-incrimination is not violated... [Because] Miranda requirements are not a constitutional prerequisite, their violation cannot form the basis of a section 1983 suit.120

Furthermore, the court held that a Fifth Amendment violation, in contrast to a violation of the Fourth, Sixth, and Fourteenth Amendments, does not occur until a statement is introduced against a defendant in a criminal trial.121 Since no incriminating statement was taken from Cooper and no trial ensued, no Fifth Amendment violation occurred.122 The court unhappily recognized that its holding would give police the discretion to decide when to follow the dictates of Miranda and that the only remedy for violation would be the exclusion of evidence at trial.123 It concluded, however, that "if there is to be any harsher penalty imposed for a simple violation of Miranda rights, we will have to wait for word from Congress or the Supreme Court."124

It should be noted here that Cooper I, like the Warren case discussed above,125 involved an intentional refusal to honor Miranda, rather than a mere failure to warn. Moreover, the facts of Cooper I were more egregious than the Warren facts: the officers and their superiors in Cooper I planned to ignore all suspects.

107 See id. at 1924.
108 See id.
109 See id.
110 See id.
111 See id.
113 See id. at 924 F.2d at 1924.
114 See id. at 1925.
request for bond in advance of any arrests.

c. Immunities, Color of Law, Proximate Cause, and Issue Preclusion

Given that the Fifth Amendment is not violated until an involuntary statement is used against *suspect* in a judicial or quasi-
judicial proceeding, a third major impediment to a § 1983 suit arises. This obstacle implicates the interplay between the Fifth Amendment timing issue and the immunities for the various state actors involved. The confluence of these factors effectively undermines all § 1983 actions based upon a Fifth Amendment violation. In these cases, either the court properly excludes such statements, or judicial and prosecutorial immunity protect those governmental officials, while the legal doctrines of color of law, collateral estoppel, and proximate cause protect the police officers.

It is well established that judges and prosecutors enjoy absolute immunity from all civil suits arising out of actions that occur in a courtroom.10 This immunity protects them from any civil rights action stemming from a violation of the Self-Incrimination Clause because such an injury can occur only during a trial. Whether the prosecutor knew or believed the confession was the product of state compulsion is irrelevant.11

Likewise, an aggrieved suspect cannot successfully sue the interrogating police officer who subsequently participates in the introduction or attempted introduction of the coerced statement. The fact that an officer’s testimony is not given "under color of law," a requirement for a § 1983 action. For example, in Edwards v. Vanze,12 plaintiff James Dale Edwards sued a St. Louis County police officer under the Civil Rights Act. Edwards alleged that the officer testified perjuredly in Edwards’s habeas corpus proceeding regarding whether a confession used against the plaintiff at his trial for murder was voluntary and that as a result of this perjury he was unsuccessful in obtaining relief.13 The court held that Edwards had no basis to sue because even if the officer falsely testified concerning what he had done, heard, and observed while dressed with his official authority, the testimony was given after the performance of his official duties and was thus not given "under color of law."14 The defendant police officer "testified as a witness [and in this respect was no different than any other witness].

Deeper consideration of this issue reveals the fallacy of the Edwards’s court’s reasoning. Its bolding is plainly wrong. Since the purpose behind custodial interrogation is to secure a confession, and the officer is the only one present besides the defendant, it is fully expected that the officer will eventually have to testify in court. During my tenure with the District of Columbia United States Attorney’s Office, I was required to complete specific forms given to Assistant United States Attorneys by the D.C. Police Department for the purpose of calling officers into trials and suppression hearings. These officers were paid overtime for such appearances and disciplined if they failed to appear. Under the court’s reason-

ing, however, the officer is not liable under the Fifth Amendment for coercing a confession prior to its use in court, and, at the same time, he is insulated from liability once the confession reaches court because, by then, he is testifying as a mere witness and is not a state actor.

A second method by which police officers escape civil rights liability, regardless of whether they take the witness stand or whether the judge rules correctly, involves the application of the doctrine of collateral estoppel. State court judgments receive res judicata effect in subsequent federal § 1983 actions.12 Moreover,

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10 See Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2613 (1993) (holding that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of her role as advocate for the State, are entitled to the protection of absolute immunity); FCC v. Wate, 444 U.S. 229 (1980) (holding federal judges enjoy absolute immunity for judicial or adjudicatory acts, a state court judge did not have absolute immunity from a damage suit under § 1983). See note 11 supra (discussion of decision to demote and dismiss a prosecution officer as an option of her gender).

11 Alternatively, if the deponent participated in the interrogation, she would receive only qualified immunity from suit based upon the act. Qualified immunity, however, would be insufficient to protect her. See infra notes 120-23 and accompanying text.

12 569 F. Supp. 164 (E.D. Mo.), aff’d, 469 F.2d 358 (8th Cir. 1972).

13 See id. at 165.

14 Id.

15 Id. at 166. This reasoning would apply where the officer gave false testimony at the original trial as well as in a habeas proceeding. See, e.g., Bell v. Layne, 460 U.S. 523, 535-38 (1983) (holding that § 1983 does not authorize a damages claim against private witnesses), cert. denied, 460 U.S. 1035 (1983); Bennett v. Pontiac, 545 F.2d 1260, 1263-64 (10th Cir. 1976) (holding that police officers testifying as witnesses at trial are not acting under color of state law); Williams v. Tuner, 610 F.2d 1028, 1032 (5th Cir. 1978); 469 F. Supp. 1045, 1058 (E.D. Pa. 1980) (holding that § 1983 does not create a damages remedy against police officers for their testimony as witnesses).

16 See 28 U.S.C. § 1788 (1988) (affording state court judgments the same full faith and credit in every Federal court as they have in states from which they are taken).
the federal common law rule of preclusion is appropriately applied to § 1983 actions. The doctrines act to bar a civil suit based upon an involuntary confession once the confession has been ruled voluntary by the criminal court.

In Hockenbottom v. McGary, an inmate convicted of armed robbery and felony murder sued officers of the Chicago Police Department who arrested him, alleging that they violated his Fourth Amendment right to due process by denying him food and water for an unreasonable length of time and violated his Fifth and Sixth Amendment rights not to incriminate himself by coercing his confession. The court granted the police officers' summary judgment motion, holding that principles of issue preclusion barred the plaintiff from pursuing his claim because the state trial court had already explicitly found the confession at issue to be voluntary.

Finally, the application of the doctrine of proximate causation also prevents liability from being placed upon officers. In Gonzales v. Timbers, an inmate who had been convicted of aggravated battery, armed violence, and attempted murder brought a § 1983 action against a police officer for allegedly coercing his confession.


105. See University of Tennessee v. Elliott, 478 U.S. 787, 797-99 (1986) (recounting common law principles of issue preclusion such that when a state administrative body acting in a judicial capacity resolves a disputed factual issue properly before it that the party had an adequate opportunity to litigate, federal courts must give the agency's facilitating the same preclusive effect to which it would be entitled in the State's courts). 106. 756 F. Supp. 950 (N.D. Ill. 1991).

The court held regarding collateral estoppel, however, may not hold true. If a confession were held involuntary in a per se suppression hearing at trial, no appeal, this determination would probably not act as issue preclusion in favor of the plaintiff and against the defendant as in a subsequent § 1983 action. At the time of the court determination, the prosecutor may have no motive to appeal the adverse ruling, because he could not have anticipated a subsequent § 1983 action based upon it. She may feel that the case against the defendant is strong enough to go forward without the statements, or that her office may not have the resources to prove all such apps. Furthermore, it may be that police officers are not concerned parties to the suppression motion, and thus there could be no issue preclusion against them. The resolution of this issue would be a matter of individual state law under Miga, see supra note 105, and some states have stricter rules regarding mutuality and identity of interests than others.

any "actual, compensable injury, [which] ... does not encompass the injury of being convicted and imprisoned."183 This result is in no way inconsistent with the Fifth Amendment's protection of "all" privileges and immunities.184 If the government seeks to deprive a person of his "liberty," the Fifth Amendment requires that this deprivation be by "due process of law." A deprivation of "life" is no different from a deprivation of "liberty." If the government seeks to deprive a person of his "liberty," it must provide "due process of law." This court is bound to follow these precedents, and it cannot ignore them. The Fifth Amendment's protection of "all" privileges and immunities includes the right to "life, liberty, and property."185 If the government seeks to deprive a person of his "life," the Fifth Amendment requires that this deprivation be by "due process of law." A deprivation of "life" is no different from a deprivation of "liberty." If the government seeks to deprive a person of his "liberty," it must provide "due process of law." This court is bound to follow these precedents, and it cannot ignore them.

2. Cases Permitting a § 1983 Action

Although only one court has held that the failure of police to honor a suspect's invocation of his Miranda rights amounts to a Fifth Amendment violation,186 several courts have held that where a suspect was actually coerced by egregious police conduct into confessing,187 a § 1983 action premised upon the violation of substantive due process was appropriate.188

The initial such case was Duncan v. Nelson.189 Plaintiff James Richard Duncan sued six Chicago police officers for damages based upon the alleged involuntary confession extracted by them.190

[Notes and Citations]

183 [Note 183: Omitted]
184 See infra note 161 and accompanying text (discussing the Upjohn II decision).
185 In Dimmick v. State, 475 F.2d 116, 119 (Alaska 1973), the prosecutor introduced the testimony of Lee Herman, who had admitted committing a robbery with the defendant, and the defendant was convicted. The Alaska Supreme Court held that Herman's confession was made after the police intentionally ignored his request for an attorney. See id. The Court upheld Dimmick's conviction, concluding in dicta that the appropriate remedy for the constitutional wrong suffered by Dimmick would be a civil rights action by him against the police officers. See id. at 119-20. However, I can find no record of such a suit ever being initiated.
186 The critical distinction here is between actual police coercion and the persuasiveness of circumstances afforded a confession taken in violation of the Miranda warnings. Clause itself was violated, the suspect would still have no § 1983 action.
187 There are three pre-Tomeo cases allowing a § 1983 claim based upon physically coerced confessions. See Schriber v. Roman, 380 U.S. 22 (1965), and 536-537 (5th Cir. 1950) (allowing § 1983 claim by a plaintiff who was subjected to "unconstitutional" police questioning in a police station cell and was physically coerced into confessing).
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190 The critical distinction here is between actual police coercion and the persuasiveness of circumstances afforded a confession taken in violation of the Miranda warnings. Clause itself was violated, the suspect would still have no § 1983 action.

[End of Notes and Citations]
Two later cases followed suit. In *Rex v. Tejpal*, the Tenth Circuit denied summary judgment to a district attorney and a police officer based upon a citizen’s allegation that he was denied liberty by being placed under a seventy-two-hour mental hold just that he was psychologically coerced into giving an involuntary confession. The court found that both of these claims were actionable as possible violations of substantive due process. Likewise, in *Buckley v. Flinzmann*, the plaintiff filed suit under § 1983 against the police officers and prosecutors involved in his criminal case, alleging that they conspired to execute him even though they knew he was innocent. In a lengthy discussion of

he was found guilty and sentenced to 20 years imprisonment. See *id.* In December of 1966, the Illinois Supreme Court held that the confession was involuntary and reversed the conviction. See *id.* This court found that the confession was voluntary. See *Dunton v. Zenker*, 396 N.E.2d 941 (Ill. 1979). Further support for the proposition that there is a cause of action for damages for an involuntary confession obtained by threats of torture or other coercion because such police conduct offends the requirements of due process and fairness implicit in the concept of ordered liberty imposed upon the states by the due process clause. *id.* The court dismissed the plaintiff’s action because no facts supported the conclusion that the defendant engaged in unlawful coercion intended to produce an involuntary confession. See *id.*
the doctrine of immunity, Judge Frank H. Easterbrook held that the prosecutor would be entitled to absolute immunity for the act of conducting an interrogation of defendant without giving him Miranda warnings because no Fifth Amendment violation occurred unless and until the statements are used in a criminal proceeding.519 If, however, the prosecutor coerced a confession by "depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon," then the constitutional injury is complete, and causes injury out of court.520 In that case, only qualified immunity would be available. The court finally held that the dismissal for Fitzsimmons was premature because it could not be gleaned from the record whether Buckley was relying on Miranda or due process.521

The Ninth Circuit, in its en banc ruling in Cooper II, took both the Fifth Amendment and due process analyses where no court had ever gone before. As noted above, the Cooper I court held that the Fifth Amendment was not violated and thus no 1983 action was sustainable on the facts of that case.522 Additionally, the court held that the conduct of the police in ignoring Miranda and in using psychological pressure during a four-hour interrogation (in an attempt to secure a confession from Cooper) was not conduct that sufficiently shocked the conscience of the court so as to constitute a substantive due process violation.523 "This conduct was simply released after spending three years in prison, unable to raise his El million bond. 524

1948. See id. at 1284. The court went further than merely noting that conducting an interrogation in the absence of Miranda warnings was a violation of a suspect's rights. Instead, it went on to determine actually "compelling a suspect to speak, where the compelled does not involve practices forbidden by other constitutional or restraints, is likewise not a constitutional violation as long as the results are not used against the suspect in court. 525 The Fifth Amendment right not to incriminate oneself is an extraordinary privilege and thus cannot be violated outside the courtroom. See id. at 1284. The Supreme Court did not address this issue in Buckley because it was not before them. The Court simply noted the Seventh Circuit's reasoning in a footnote: The (lower) court reasoned that, because claims based upon Miranda v. Arizona and the Self-Incrimination Clause of the Fifth Amendment depend on what happens at trial, prosecutors are entitled to absolute immunity from suit. Therefore, as a matter of course, only qualified immunity is available against petitioner's claims as to "coercive tactics that are independently wrongful." Buckley, 113 S. Ct. at 2611 n.2 (citation omitted).

1949. See Cooper I, 924 F.2d at 1559 n.20 (7th Cir. 1991), rev'd sub nom, 963 F.2d 520. See Cooper I, 924 F.2d 1550, 1550 & 1550 (7th Cir. 1991), rev'd sub nom, 963 F.2d 520.

1950. See Cooper I, 924 F.2d 1550, 1550 & 1550 (7th Cir. 1991), rev'd sub nom, 963 F.2d 520. See Cooper I, 924 F.2d 1550, 1550 & 1550 (7th Cir. 1991), rev'd sub nom, 963 F.2d 520.

1951. See Cooper I, 924 F.2d at 1550, 1550 & 1550 (7th Cir. 1991), rev'd sub nom, 963 F.2d 520.

1952. See Cooper I, 924 F.2d 1550, 1550 & 1550 (7th Cir. 1991), rev'd sub nom, 963 F.2d 520.

1953. See Cooper I, 924 F.2d 1550, 1550 & 1550 (7th Cir. 1991), rev'd sub nom, 963 F.2d 520.

1954. See Cooper I, 924 F.2d 1550, 1550 & 1550 (7th Cir. 1991), rev'd sub nom, 963 F.2d 520.

1955. See Cooper I, 924 F.2d 1550, 1550 & 1550 (7th Cir. 1991), rev'd sub nom, 963 F.2d 520.

1956. See Cooper I, 924 F.2d 1550, 1550 & 1550 (7th Cir. 1991), rev'd sub nom, 963 F.2d 520.

1957. See Cooper I, 924 F.2d 1550, 1550 & 1550 (7th Cir. 1991), rev'd sub nom, 963 F.2d 520.

not as serious as in cases in which substantive due process violations have been found, as, for example, in the instances of serious police brutality or deliberate indifference toward a citizen who the police have placed in danger or to whom they owe a duty.531

The Ninth Circuit en banc panel, in a seven-one-three decision, reversed the original panel's decision. In Cooper II, the full court held that the Fifth Amendment was violated by the police officials coercing Cooper, after he invoked his right to remain silent, into making potentially incriminating statements, which were never introduced against him at trial.531 This holding that the Fifth Amendment's Self-Incrimination Clause applied to a suspect's statements made "in the sheriff's department, and which the prosecution might have used at trial," defies precedent532 and is not likely to be followed by any other circuit.533 The majority had no case support for its position. Although it quoted long passages from the Miranda decision that appeared to support its position, these passages have been repudiated.534 The pre-incorporation cases cited535 to support the claimed violation of the privilege against self-incrimination discuss only the Due Process Clause of the Fourteenth Amendment and thus, in those cases, the Court had no need to decide whether or when a Fifth Amendment violation occurred.

Likewise, the post-incorporation cases cited by the majority.536

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which did discuss the privilege, held only that there is a distinction between actual compulsion and presumed compulsion, not that the Fifth Amendment can be violated at the station house. Thus, by ignoring the requirement that a statement be used in a criminal trial and by defining Miranda violations as compulsion, the Cooper II court sanctioned a cause of action based upon the Fifth Amendment whenever Miranda is violated.170 Second, the Cooper II court held that substantive due process was violated both by the coercion of non-incriminating statements and by the Taek Force's unlawful plot to deprive Cooper of the privilege of testifying in his own defense and presenting an insanity defense. These few exceptional cases will not serve to protect or enforce the dictates of Miranda. One of them, Cooper II, is simply incorrect, and the rest are actually police brutality and not confession cases. Thus, the problem outlined in the introduction of this Article remains unresolved.

II. THE CONSEQUENCES OF ABANDONING MIRANDA

A suspect's "right" to receive her Miranda warnings and to have her invocation of the rights contained in those warnings honored has not been affirmed in recent court decisions. "Beyond this duty to inform, Miranda requires that the police respect the accused's decision to exercise the rights outlined in the warnings. If the individual indicatives in any manner, at any time prior to or during questioning, that he wishes to remain silent, . . . the interrogation must cease."171 Likewise, in order to prevent police from badger-

U.S. 435, 441 (1974) ("Where the State's actions offended the . . . Due Process Clause, the State was then deprived of the right to use the resulting confessions in court") (emphasis added); In re Persimmon, 457 U.S. 334, 338 (1982) (holding that once a confession is in a hospital bed was actually involuntary and, therefore, "[e]ither procedure or the use of confessions obtained as these were cannot be used in any way against a defendant at his trial") (emphasis added).

170 See supra Part II.A.

171 See supra Part II.A.

172 See supra n.456, 473 U.S. 412, 419 (1980) (citation omitted); see also Michigan v. Mosley, 423 U.S. 96 (1975) (holding that although police cannot reinterview defendant regarding colory offense after he asserted his right to silence, a different

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ing a defendant into waiving her previously asserted Miranda rights, the Court last term affirmed that a suspect who has unambiguously invoked her right to counsel cannot be questioned regarding any offense, unless an attorney is actually present.175 Such rules are necessary to protect the privilege against self-incrimination, otherwise "[w]hen a suspect understands his [expressed] wishes to have been ignored . . . in contravention of the 'rights' just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogations."176

I believe that few of us would care to live in a society in which police officers could interrogate citizens at will for indeterminate periods of time (in other words, revert back to pre-Miranda "third-degree" police techniques).177 While it is one thing to be questioned by an attorney or judge in open court (and even be compelled to answer if offered Kastig-type immunity178), it is quite another to be interrogated in secret by law enforcement officials. Confession may be "good for the soul" when given to a listener who has your best interests at heart (such as a parent); it is certainly not good for the body when given to those whose utmost desire is to have you incarcerated or executed. This situation creates great harm to the suspect, regardless of whether any statements are ever used against him in a criminal trial. The autonomy and dignity of
the individual sought to be protected by the Self-Incrimination Clause is certainly lost.

Although the Court purports to reaffirm the stability and importance of the rights guaranteed by the Miranda decision, it has consistently refused to provide an adequate remedy for the violation of these rights. Given the legal obstacles to protecting the Self-Incrimination Clause, an outright disregard for Miranda's safeguards is precipitously beginning to occur throughout the country. Law enforcement officials are in the business of solving crimes, not protecting constitutional rights. Since the values enshrined in the Self-Incrimination Clause, in certain instances, may not further the truth-seeking function of an investigation and trial, and since these values certainly do not serve the adversarial goals of officers and prosecutors, officers will be tempted to ignore them. Today's Court, by severely limiting the remedies available for violations of the Self-Incrimination Clause and the Miranda warnings, not only permits officers to ignore both but actually encourages their violation. The following consequences flow from abandoning the remedies for a violation of the Fifth Amendment values protected by Miranda.

A. The Contours of an Interrogation Will Be Determined by the Executive Rather Than the Judiciary.
   Some "Real Life" Horror Stories

This approach is problematic because it fails to create incentives for law enforcement officers to comply with Miranda. The Cooper case provides an excellent example of the response of such officers to the lack of incentives. The most interesting aspect of Mr. Cooper's nightmare, from a scholarly point of view, is that the Arizona police had determined, in advance, that when they arrested a Prime Time Rapist suspect, they would "continue to ask him questions despite his request for silence or for an attorney."

They had decided "that the violent nature of the series of incidents and public safety demanded that the police obtain more information than following Miranda would allow." Law enforcement understanding of how present Supreme Court doctrine protects their actions is exhibited by the statement made by Detective

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Weaver Barkman at the summary judgment hearing in the Cooper case. He testified:

I continued the interrogation, hoping that it would be at least held voluntary to keep him off the stand and to deprive him of the opportunity of forming an insanity defense ... [3] these were my motives for violating, trampling on his civil rights and I mean, I'm going to violate this American citizen's rights, but look year."

I predict numerous similar incidents "will follow in Cooper II's wake. For example, a, a much publicized case in the Washington, D.C.-Baltimore area involved the disappearance of Laura Bethesda, a young Harvard graduate, from her mother's extensive searches in three states and presumed the missing woman, a homeless man who did odd jobs for Laura's mother, was arrested as a murder suspect. A county police department detective was acquitted during a suppression hearing that the police department had intentionally decided not to advise Clark of his Miranda rights before his arrest. The detective also stated that "homicide investigators' put aside our normal standard procedures for the greater good of possibly finding the bodies of Haughton and other missing persons."

Apparently, these officers determined that this greater good necessitated ignoring Clark's "more than 100"

199 Cooper II, 568 S. Ct. 1290, 1277 (1992) (in banc), certi. denied, 113 S. Ct. 407 (1992); see also People v. Wilman, 606 N. J. 1196, 1199 (1992); certi. denied, 114 S. Ct. 1219 (1994). In Wainwright, police administered the Miranda warnings, ignored the defendant's attorney's request for counsel, and obtained statements in which the defendant confessed to a murder. See id. at 1199. While defendant's attorney filed a motion to suppress the trial. The United States Supreme Court provided no incentive for law enforcement officials to honor a Miranda warning.
requests for an attorney during the interrogation and threatening Clark with "death in the gas chamber." Although the prosecutors in the case conceded that police violated Clark's legal rights and would be barred from using Clark's statements at trial, police officials stated that "the violations of Clark's legal rights did not jeopardize their case against Clark because they already had enough evidence against him" without these statements.

As these examples indicate, if we eliminate Miranda entirely, or simply retain its present status as a nonconstitutional prophylactic rule with no effective remedy available for its violation, then police officers can continue to ignore a suspect's request not to be interrogated. In fact, the incentives work in favor of ignoring such a request. There is still an advantage in giving the warnings; if a suspect agrees to waive his rights and gives a confession, that statement might be admissible in the prosecutor's case-in-chief. Once a suspect invokes his rights, however, his subsequent statements become inadmissible anyway, and police officers have nothing to lose by continuing the interrogation and something to gain, such as developing impeachable evidence and other leads. Of course, if the officers break off the interrogation and allow the suspect access to an attorney, the possibility of obtaining a confession is lost.

Thus, there is extreme dissonance between the content of the warnings and the actions of the officers. It is, at best, unseemly for the officers to offer rights which they proceed to ignore. A more honest approach would be to formulate new warnings in light of the limitations on Miranda. For example, the officer might say, "You do not have the right to remain silent. If you request silence or an"

166 See Mapp v. Ohio, 367 U.S. 640, 643 (1961) ("[T]herefore, plainly appears that the factual considerations supporting the failure of the Wolf court to include the Weeks exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1914 . . . could not, in any analysis, now be deemed controlling.")
167 See, e.g., Edward L. Barrett, Jr., Exclusion of Evidence Obtained by Illegal Search and Seizure in People v. Cohen, 45 Cal. L. Rev. 650 (1957), Barrett, note 164 [Prior to the adoption of a state exclusionary rule in California] the police were under no substantial pressure to seek clarification of the [Fourth Amendment]. The issue of legality became crucial to neither the police nor the court, because the police had, in effect, broad discretion in determining the procedures to follow, subject only to community pressures, particularly those imposed by the press, which rarely focused upon any but the most obvious abuses.
168 Id. at 577. Other commentators have discussed the problem. For example, Judge Roger J. Traynor, discussing his opinion in People v. Cohen, 232 P.2d 905 (Cal. 1951), in which the California Supreme Court adopted the federal exclusionary rule as a matter of state law, noted:
169 It became impossible to ignore the circuity that illegal searches and seizures were also a routine procedure subject to no effective deterrent; else such illegally obtained evidence came into court with such regularity.
170 As noted in People v. Cohen, supra note 168, the United States Supreme Court has indicated that it was one thing to condemn an occasional police officer's blunder, to accept his illegally obtained evidence so that the guilty would not go free. It was quite another to condemn a merely course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States.

Roger J. Traynor, Mapp v. Ohio at Large in the Fifty State, 1962 Duke L.J. 319, 322; see also Sidney E. Zinno, Detaining Get a Conviction: They Return to Classroom in Study
of the Fourth Amendment remains unchanged regardless of the remedy for its violation. Thus law enforcement officials should have been learning and obeying search and seizure rules as dictated by the Court regardless of the existence of an exclusionary rule. This, however, did not occur. Because the Court did not enforce these Fourth Amendment rights by providing a remedy for their violation, many prosecutors’ offices and police precincts were unconcerned with upholding them and could not be troubled to train their law enforcement personnel as to the controls of this amendment.

This natural human tendency to assume where there is no remedy, there must be no right, is repeated in Fifth Amendment jurisprudence. If no remedy is provided for a Miranda violation, officers will simply stop offering and ignoring these warnings. If there is no remedy for a Fifth Amendment violation, officers will discover this as well and ignore the Fifth Amendment. Thus, in regard to the self-incrimination Clause, we are in danger of the same kind of lawlessness that we experienced toward Fourth Amendment rights prior to Mapp.

B. Inappropriateness of a Right Without Remedy

If there exists, as the United States Supreme Court claims, a right to be free from interrogation in the absence of Miranda warnings and/or a right to have one’s invocation of the right to remain silent or to consult with an attorney respected, then at present this is a right without a remedy. Allowing a civil rights remedy of either damages or injunctive relief would protect both innocent and guilty victims from brutal police practices.

from a prosecutor’s ex parte brief, while in pre-Mapp days, evidence taken in violation of the Fourth Amendment was not excluded. Nevertheless, the basis for the analogy survives. In the Fifth Amendment context, police officers benefit from antifield use of the excluded statements in their case-to-case. In the Fourth Amendment context, however, the case is usually dismissed if the prosecutor cannot use the physical evidence in his case-in-chief. Therefore, in the Fourth Amendment arena, the exclusionary rule gives police officers a reason to obey the law, whereas in the Fifth Amendment situation, it does not.

We see, in fact, in some danger of a erosion of this same Fourth Amendment lawfulness today. The Court has deconstitutionalized the Fourth Amendment’s exclusionary rule as well, holding that it is no longer a constitutionally required remedy but merely a method of deter improper police behavior. See Ruth W. Grant, The Exclusionary Rule and the Meaning of Separation of Powers, 14 Harv. J.L. & Pub. Pol’y 173, 159-61 (1991) (arguing that under a unitary model of criminal punishment the exclusionary rule is constitutionally required by the Fourth Amendment but due process); see also Sime v. Powell, 425 U.S. 655, 684-86 (1976). Thus, the Court’s source of authority for imposing the exclusionary rule was not to the invisible, origin.

See supra notes 172-74.

Actually, there is a partial remedy for those who are charged— the exclusion of the statement from the prosecutor’s case-in-chief. See supra note 186 (noting a case in which this exclusionary rule was recognized). Even this inadequate remedy, however, is unavailable to uncharged suspects.

One commentator posits that courts are oppressed to the frequent unfairness of minority damages in § 1983 suits and suggests that ambiguous police practices are better resolved by injunctions against police departments. See Christine Whiteman, Constitutional Torts, 79 Mich. L. Rev. 5 (1980) (arguing that pursuant to the Civil Rights Act of 1871, police departments may be subject to suit if clear constitutional standards on the police without excluding evidence obtained in violation of those standards.

One could argue that these Fourth and Fifth Amendment situations are not analogous because presently statements taken in violation of Miranda are excluded

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Although in a civilized society reasoned considerations of justice should apply to all members equally, there is visceral appeal in protecting those innocent of wrongdoing. By most accounts, only fifty percent of those arrested (and presumably interrogated) are convicted.176 While many of these releases may be due to insufficient evidence or procedural or witness-related problems rather than actual innocence, rarely some number of truly innocent people get caught in this net. For those who do not go to trial for the crime about which they were interrogated, "it is damages or nothing."177

C. Maintaining Miranda's Symbolic Value

Miranda is symbolic of our societal commitment to the Constitution and to criminal procedural guarantees.183 It accomplishes this when the police come into contact," and this policy causes a constitutional injury to a plaintiff. City of Canton v. Harris, 489 U.S. 77, 88 (1989). In order to have a viable § 1983 claim against a municipality, however, a state actor must first commit an independent constitutional violation. See Monell v. Dept. of Social Servs., 436 U.S. 658, 691 (1978) ("Congress did not intend municipalities to be held liable unless actions of official municipal policy of some nature caused a constitutional tort."). Thus, a municipality currently cannot be held liable for a Miranda violation committed by one of its officers. In any case, even where the police department or municipality can be held responsible for a constitutional violation, the remedy is generally limited to damages rather than injunctive relief. See, e.g., City of Los Angeles v. Lyons, 460 U.S. 95, 105 (1983) (reviewing the grant of an injunction against the Los Angeles police department for the use of "chokeholds" due to the lack of evidence suggesting that the civil rights plaintiff would again be arrested and subjected to a chokehold.

See Brian Forst, Criminal Justice System: Measurement of Performance, 2 RISK MANAGEMENT & COMPL. LAW J. 479, 481 (Handford H. Kudlack et al., 1985) noting that the conviction rate is approximately 50%, but the rates of convictions to arrest, including cases that are not successfully prosecuted; see also YLL KAMARAD et al., SOCIAL PROBLEMS AND CRIME: CASEMENTS AND QUESTIONS (7th ed., 1995) ("The cases against 50-50% of all arrests will be dropped as a result of prosecution decisions.") Boren v. Six Unknown Named Agents of F.B.I., Bureau of Narcotics, 409 U.S. 480, 410 (1972) (Harry A., concurring).

See Caplin, supra note 13, at 1741. Caplin has stated: For its supporters, Miranda is a gesture of government's willingness to treat the law-abiding citizen as worthy of respect and consideration. They have a point in saying that the deterrent attractiveness of a legal system that indicates that suspects have a right to refuse to answer police questions, that imposes on the police a duty to communicate that right, and that provides counsel to the indigent. The Fifth Amendment, as much as any constitutional provision, illustrates that care is a limited government. It reflects an historic distrust of authority.

176 See Schmide, supra note 23, at 675 ("A law things have turned out, Miranda did accomplish something, and it did do it surprisingly little cost."). One author has suggested that an empirical study be conducted to assess the offices that expanded § 1983 liability would have on state and local governments. See Reimer, supra note 7, at 85 suggesting that empirical evidence is necessary to enable courts to balance the competing interests of maximizing compensation to the victim and of allowing law enforcement officers to perform effectively, lest judges look to their own political views.

177 See, e.g., DEPARTMENT OF JUSTICE REPORT, supra note 7, at 152 ("In 218, Convicting Crimes Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal and Procedure of the Senate, subcomm. 9th Cong. 1st Sess. 206-07 (1957) (describing Philadelphia study finding that refusal to make a statement increased from 25% to 50% after Miranda."); see also 710, 1125 (describing New York study finding that percentage of manslaughter felony cases presented to grand juries involving reductions at from 49% to 50% following Miranda); Richard E. Borgerding & R. L. Wissick, Jr., Miranda in Philadelphia: A Thirty Statistic, 27 U. PITT. L. REV. 11 (1967) (finding a 10.9% decline in the confession rate.

178 See L. M. BAKER, MIRANDA: CRIME, LAW AND POLICY 190-91, 405-06 (1953) (describing summary of studies that found decreasing confession rates for the first year or so after the Miranda ruling but found that conviction rates returned to their former levels one year later); see A.A. BONO, SPECIAL COMM. ON CRIMINAL JUSTICE IN THE FREE SOCIETY, CRIMINAL JUSTICE IN THE CITY 5 (1968) (finding that Miranda did not have "significantly hardship police and prosecutors in their efforts to arrest, prosecute, and obtain convictions"); Kamier, supra note 23, at 860-614 (listing empirical studies on the impact of Miranda).

179 See Professor Whisman noted, [T]he function of a "supplementary" federal cause of action under section 1983, and of allowing plaintiffs to pursue such actions in federal court, is to redress errors and has been described as a "supplementary" cause of action. Such a cause of action is a largely symbolic. But symbolicism is important in our federal system, where the lines between nation and state are significant but difficult to define. Even where state relief exists it makes a great deal of sense to provide a federal cause of action, and federal jurisdictions, in order to affirm those rights of the federal government believes to be of special importance.

Whisman, supra note 197, at 24.
The warning has contributed generally to a more humane police culture, and also correctly imposes some limits on police tactics in specific cases. The reading of rights affects the questioner, even if it glosses off the suspect. Only a coerced confession can line with reading the Miranda card by the glare of the arc lamp. And the law-abiding police interrogator must tread rather lightly; too much pressure and the suspect may invoke the right to counsel.

Finally, Miranda's exclusionary rule is a symbol of the Court's refusal to condone the unlawful conduct that produced the confession. This "judicial integrity" rationale posits that a court ought to nullify a constitutional violation rather than admit the evidence and thereby permit the government to profit by its wrongdoing. Such denial of court assistance in perpetuating the violation is necessary to maintain respect for the Constitution and to preserve the judicial process.

III. PROPOSED SOLUTIONS

An extensive scholarly debate has taken place regarding the legitimacy of Miranda's prophylactic rules in particular and of prophylactic rules in general. The resolution of this debate in favor of legitimacy and a reconstitutionalization of such rules would be the best method for protecting the Self-Incrimination Clause. It would allow a § 1983 action based upon a Miranda violation or involuntary confession and put to rest the Article III legitimacy concerns that arise when federal courts overturn state court criminal convictions based upon Miranda violations. I will discuss this option last.

Other methods for accomplishing this objective without overturning Supreme Court precedent include refining the law surrounding substantive due process and Fourth Amendment

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jurisprudence. The latter two solutions, while not as promising or encompassing, would eliminate the primary obstacles to basing a § 1983 action on the Fifth Amendment—that the Self-Incrimination Clause cannot be violated until the statement is used in court and that police officers are not the proximate cause of the admission of such evidence.

A. The Due Process Clause

One potential solution to the deconstitutionalization of Miranda is to concede, as argued in this Article, that neither the Miranda decision nor the Fifth Amendment's Self-Incrimination Clause provides the basis for a § 1983 action, and instead turn to the Due Process Clause of the Fourteenth Amendment for guidance. This was the path chosen by the Cooper II court, which adopted the theory that substantive due process "flatly prohibits coercion in the pursuit of a statement." The theory is flawed, however, because it fails to distinguish between substantive and procedural due process, and it fails to distinguish between the standard for finding a confession to be involuntary and the standard for finding a substantive due process violation. Most, if not all, coerced confession cases are procedural due process cases. The process that is due a defendant before a State can deprive her of liberty through a criminal conviction is a fair trial. A fair trial is one that, among other things, is free of coerced confessions. Nothing in the Constitution prohibits the taking of the confession. In fact, the Government can compel statements in many circumstances; it simply cannot use them against the speaker in a criminal proceeding. Consequently, most trial and trial-related rights contained

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[incoherent text]
action was censured by the Supreme Court on what has been interpreted to be substantive due process grounds involved torts and stomach pumping. Where a substantive due process violation is found, a plaintiff may invoke § 1983 regardless of the availability of a state remedy, for "the constitutional violation is complete as soon as the prohibited action is taken." In many cases, however, although there is a deprivation of a recognized and thus fit into category (1). In this action of the Article, all references are to category (2), which I will call "pure" substantive due process rights. These rights are not specifically mentioned in any constitutional clause. Pure substantive due process can be violated by either legislative encroachment, as in Roe v. Wade, 410 U.S. 113 (1973) (striking down a Texas statute that prohibited abortions as violations of the right to privacy); or by legislative executive action, as in Rochin v. California, 342 U.S. 165, 174 (1952) (overruling criminal conviction for possession of morphine based on evidence obtained through forcible pumping of defendant's stomach). The Court itself has distinguished between what I call "pure" substantive due process and procedural due process as follows:

So-called "substantive due process" presents government from engaging in conduct that "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," Prince v. Massachusetts, 321 U.S. 158, 166 (1944). When government action depriving a person of liberty, life, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). This requirement has traditionally been referred to as "procedural" due process.

United States v. Salerno, 481 U.S. 739, 746 (1987). See, e.g., Brown v. Mississippi, 297 U.S. 134 (1936). In this case, the Court stated that the government had no "substantive due process" to challenge the constitutional validity of a law as a deprivation of liberty prior to the obtaining of a statute. Meyer v. Nebraska, 262 U.S. 390, 395 (1923) (striking down an Oregon statute that required all children to attend school) and its progeny, was based on the deprivation of liberty interests in having their child for the ten-year-old son (the "pure" substantive due process rights). In this case, the Court held that the state's action was a "pure" substantive due process violation. In the latter case, however, the Court held that the state's action was a "pure" substantive due process violation. In the latter case, however, the Court held that the state's action was a "pure" substantive due process violation. In the latter case, however, the Court held that the state's action was a "pure" substantive due process violation. In the latter case, however, the Court held that the state's action was a "pure" substantive due process violation. In the latter case, however, the Court held that the state's action was a "pure" substantive due process violation.
property or liberty interest, the Court has held that the procedure due process is to be determined by the evidence obtained by these deprivations in court or to provide a state tort or criminal law remedy. Thus, in most due process cases, a § 1983 claim is not stated. In other words, unlawful conduct by state officials does not rise to the level of a substantive due process violation. Most reasonable persons would agree, however, that recent Supreme Court cases concerning the Fourth and Eighth Amendments hold, that in the case of actual police brutality, the "constitutional line" has been crossed, and, therefore, a § 1983 action is available, regardless of alternative remedies.

Due to the subjective nature of the test used to establish a violation of substantive due process and the lack of definition as to the contours of the right, there is no objective method for determining when any particular action has crossed this "constitutional line." To determine if a state actor's conduct that coerces a


f In addition to the claims that the police used excessive force in an arrest, the plaintiffs also asserted that the police violated the plaintiffs' rights to be free from "collective punishment," which included the deprivation of the right to the "peaceable use of property" and the right to "peaceable use of the streets.

162 For example, in Agan, the Court ruled only on the Eighth Amendment and procedural due process claims, leaving open the possibility of bringing a § 1983 suit for substantive due process claims on the same facts. See, e.g., Agan, 434 U.S. at 47 ("We have no occasion, in this case . . . to decide whether or not the unwarranted seizure of private property can be treated as if it were an act of the state in violation of the Due Process Clause.") (dissenting opinion). Also, in the recent case of Owen v. City of Independence, the Court held that the police had acted arbitrarily in arresting a person for walking on the street. See, e.g., Owen v. City of Independence, 456 U.S. 622 (1982) (holding that the police had acted arbitrarily in arresting a person for walking on the street).

163 See, e.g., Owen v. City of Independence, 456 U.S. 622 (1982) (holding that the police had acted arbitrarily in arresting a person for walking on the street). ...
The Supreme Court has likewise offered the possibility of § 1983 actions based upon substantive due process in cases involving the loss of personal security or liberty.221 I suggest that the taking of a confession which is actually involuntary, as not just a non-intravention of Miranda, would violate procedural due process if used in court, but in many instances would not so shock the conscience of the court that substantive due process would be violated at the time the confession was taken.222 The interrogation of a suspect does constrain his liberty, but it is not taking liberty without due process so long as the officer had a warrant or probable cause to arrest.223 In fact, it is the officer's

408 U.S. 958 (1990). Meger v. Oubre, 841 F.2d 518, 520 (5th Cir. 1988) (holding that a public school teacher's decision to discipline a student, "if accomplished through excessive force and appreciable physical pain," may violate substantive due process if the teacher acted with the intent to cause harm); Check v. West, 785 F.2d 554, 558 (5th Cir. 1986) (indicating that a police officer who intentionally threatened a suspect with his vehicle might violate substantive due process if his actions amounted to an abuse of official power that shocks the conscience); White v. Rockford, 592 F.2d 881, 883 (7th Cir. 1979) (holding that a police officer's refusal to help a distraught person in an automobile after the officer arrested the driver amounted to a deprivation of substantive due process "where that refusal ultimately resulted in physical and emotional injury to the children").

221 See, e.g., Herrera v. Collins, 113 S. Ct. 853, 876, 876-79 (1993) (Blackmun, J., dissenting) (arguing that the execution of an innocent defendant is an arbitrary imposition on liberty which shocks the conscience); Foucha v. Louisiana, 113 S. Ct. 1780, 1809 (1993) (Thomas, J., dissenting) (arguing that legislation permitting continued confinement of an insanity acquittee until she can demonstrate that the processing department has substantially shocked the conscience); Collins v. Harker Heights, 113 S. Ct. 1061, 1070 (1993) (holding that a crimes' failure to train or warn employees about the use knives, hammers, poisons and the like in the home, resulting in death by espaniel in a manhole, was not sufficiently arbitrary or conscience-shocking to violate substantive due process); Halderman v. Winnebago County, 846 F.2d 113 (1989) (holding that substantive due process guarantees against state deprivation of safety and security does not prohibit the police from affirmatively constitutional to prevent a parent from abusing her child, even where state employees receive insufficient reports of abuse); 418 U.S. 769, 746 (1977) (holding that the Bali National Act of 1965 that authorizes partial deprivations of punishment by trial, but rather a permissible regulation preventing danger to the community). Young v. Romero, 457 F. Supp. 304 (1979) (holding that involuntarily committed patients at state mental institution had a substantive due process interest in reasonably safe conditions of confinements). Hence, the estate of 1968 U.S. 718, 727 (1978) (citation omitted).

222 Although the Cooper II cases were decided by the Supreme Court, the case of Miranda in order obtain statements it was concluded that they could not be used to keep the defendant off the street that to enforce the law of a potential insanity defense, the Supreme Court has sanitized the present use of statements taken in violation of Miranda. Indeed, statements taken in violation of Miranda are regularly used the way of out criminal justice system. This is not to say that this is not an error of constitutional consequences. See supra notes 45-57 and accompanying text. Thus, these police officers were simply using clever Supreme Court decisions that specifically penalize their behavior.

223 See Colorado v. Connelly, 479 U.S. 157, 168 (1987) (holding that "evasive police activity is necessary precedent to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause").

224 See, e.g., Arizona v. Fulminante, 111 S. Ct. 1246, 1252 n. 2 (1991). Schneckloth v. Bustamante, 412 U.S. at 226 (1977) (setting some of the factors that the Court has considered in determining whether a confession was truly voluntary, including "the youth of the accused, his lack of education, [and] his low intelligence") (citation omitted).

225 See, e.g., Collins v. City of Hacker Heights, 112 S. Ct. 1001 (1992). In Collins, the Court stated:...
constitutional violation in any § 1983 suit, the Court rightly favors the use of specific provisions in the Bill of Rights over more general notions of the Fourteenth Amendment's Due Process Clause. A substantive due process claim, basically a claim that one was treated in a shameful manner, is much narrower than a Fifth Amendment Self-Incrimination Clause claim. Since the Fifth Amendment's Self-Incrimination Clause was not violated, it appears distinguishable to bootstrap the compelled statement claim through a substantive due process analysis.

The second, more practical disadvantage with a substantive due process approach is that the Court will be required to engage in the same case-by-case analysis it used to determine the voluntariness of pre-Miranda confessions. Of course, the Court may still, under certain circumstances, be required to determine actual voluntariness, but Miranda provides the convenient presumption that the confession was voluntary (if followed) or involuntary (if not followed). Determining voluntariness is extremely difficult without the aid of the presumption and constitutes an unmanageable drain on judicial resources.

Moreover, deeming all involuntary confessions to be of substantive due process would provide insufficient guidance to police as to what constitutes acceptable behavior, an issue that was resolved by Miranda's bright-line rule prior to its deconstitutionalization. As a result, police may cease all custodial interrogation rather than run the risk of being found civilly liable. For example, the Court's most recent holding that a confession was involuntary was premised, in part, on the Court's finding that the defendant possessed low-average to average intelligence, dropped

As a general matter, the Court has been reluctant to expand the concept of substantive due process because that guidance for responsible decisionmaking in this uncharted area is unclear and open-ended. The Court has been unwilling to provide explicit guidelines for judicial self-restraint and to exercise the same care whenever we are asked to break new ground in this field.

At 1068 (citations omitted), see also Fornaro v. Harkwarb, 479 U.S. 186, 195 (1986) ("[T]here was... frightened to expand the substantive reach of... [the Due Process Clause]...it requires redefining the category of rights... it is fundamental.").

The Court was correct in holding that "all claims that law enforcement officers have used excessive force... in the course of an arrest... should be analyzed under the Fourth Amendment and its reasonableness standard, rather than under a "substantive due process" approach.

In contrast, a substantive due process claim would apply if there were actual coercion, not mere denial of Miranda. This theory would fail to offer a § 1983 cause of action for a Miranda violation, even if done purposely.


See id. The Court's holding was also based on the findings that the defendant was in danger of physical harm at the hands of other inmates and that the F.I.S.I. refused to permit him to exercise the same care whenever we are asked to break new ground in this field.

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the State owes a duty to take care of those who have already been deprived of liberty. [The Court has held, for example that] ... the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, for persons in mental institutions, for convicted felons, and for persons under arrest.90

Those being interrogated thus deserve a higher degree of protection from the State because their liberty has been curtailed by it. The corresponding duty of the State may be to provide Miranda rights to all suspects or at least to refrain from intentionally ignoring a suspect’s request for an attorney or to remain silent. Such a solution would overcome virtually all of the obstacles to enforcement noted in Part II of this Article. Substantive due process is a constitutional requirement, not a prophylactic rule, and is violated immediately regardless of later court use of any evidence collected via the violation. The offending officer’s actions would be under color of law when committed and would be the proximate cause of the plaintiff’s injury. While use of this legal theory would permit a damage claim as well as exclusion of any evidence collected as a result of the violation from the prosecutor’s case-in-chief, it would probably mandate exclusion of all collateral uses of this evidence as well.

B. The Fourth Amendment

The Court has held that all § 1983 claims that law enforcement officers used excessive force in the course of an arrest, investigative stop, or other seizure are properly analyzed under the Fourth Amendment, not substantive due process.96 The standard for determining whether a Fourth Amendment violation has occurred is an objective one: whether the officer’s actions were “objectively reasonable” (citing the argument that the city’s failure to train or warn its employees about known workplace hazards violated due process).

96 Id. at 1099-10 (citations omitted).

90 See Graham v. Connor, 490 U.S. 368, 375 (1989) (holding that a claim of excessive force under § 1983 is properly analyzed under the Fourth Amendment, which provides “an explicit textual source of constitutional protection against excessive force by governmental agents” and thus prohibits “unreasonable” and “unlawful” conduct, rather than the “more generalized notion of ‘substantive due process’”). See also Wilson v. City of South Carolina, 569 U.S. 1 (2013) (noting Graham, excessive force claims arising before or during arrest are to be analyzed exclusively under the Fourth Amendment’s reasonableness standard rather than the substantive due process standard ... ” (quoting Graham v. Holt, 569 U.S. 106, 109 (2013)).

96 The Graham Court rejected, for purposes of Fourth Amendment analysis, Judge Friendly’s four-part substantive due process test developed in Johnson v. Zeigler, 650 F.2d 1020, 1023 (2d Cir., cert. denied, 454 U.S. 1068 (1981). See Graham, 490 U.S. at 375. Friendly’s substantive due process test considered (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. See Graham, 490 U.S. at 375. Instead, the Graham Court adopted the more plaintiff-friendly objectively reasonable standard.

97 See Graham, 490 U.S. at 379. Judge Friendly’s test was adopted by the Court, however, in determining whether excessive use of force by a guard against a convicted prisoner during a riot violated the Eighth Amendment. See Whitley v. Albers, 475 U.S. 314, 321-24 (1986) (holding that the question whether the nature of the incident is sufficiently serious to justify a use of force is one of reasonableness within the meaning of Graham, and that Graham’s test is the appropriate test to determine reasonableness.).

98 The Eighth Amendment is satisfied if the force is applied in a good faith effort to maintain or restore order and does not violate an individual’s dignity or amount to cruel and unusual punishment, but this rule is not always followed. See Whitley, 475 U.S. at 319-21 (holding that Graham, which was intended to apply to a prisoner using excessive force, is not appropriate in a case such as this, where the prisoner is not a “guard” and the conduct is not a “penal” statute violation).

99 See Graham, 490 U.S. at 109-10 (“Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force by the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today.”). The Eighth Amendment’s protection against cruel and unusual punishment, which does not apply until after conviction and sentencing, see Ingham v. Wright, 445 U.S. 307 (1980), applies to all allegations of excessive force against a convicted prisoner. See Hudson v. McNeill-Davis, 112 S. Ct. 903, 909 (1992) (holding that the Eighth Amendment standard applies in § 1983 actions alleging brutish conduct, including murder and torture, by guards). Thus, these citizens who have been successfully acquitted and actually served, but not convicted, remain eligible for the Eighth Amendment protections against excessive force.

The Court has, however, applied the Fourth Amendment’s prohibition against unreasonable seizures and searches to pretrial detainees, while refusing to apply the same protection to convicted prisoners. Compare Bell v. Wolfish, 441 U.S. 567, 576,
whether the Fourth Amendment or substantive due process would protect those, like Mr. Cooper, who have been arrested and booked but not yet arraigned or convicted.\(^{109}\)

The better position is to apply the Fourth Amendment to those pretrial detainees, whether formally charged or not, who were interrogated prior to being imprisoned or who have been separated from the general prison population for purposes of interrogation.\(^{110}\) In such situations, application of the least-encroaching subjec-

890-91 (1984) (concluding that pretrial detainees maintain limited Fourth Amendment rights similar to those discussed in Bell v. Wolfish and Bell v. Wolfish, 441 U.S. 565 (1980)); alternatively, whether due process is not available to protect "privacy of his prison cell and thus no has 1985 action based upon a Fourth Amendment violation.

109 Cooper v. Bremner, 61 F.3d 1777, 1778 (9th Cir. 1995) (finding that where officers physically restrain a suspect during interrogation, the Fourth Amendment was implicated and not to determine whether police used excessive force against this pretrial detainee, in violation of the Due Process Clause of the Fourteenth Amendment, was Eighth Amendment inquiry as to whether force was used to achieve a substantial evil not made necessary by the nature of the case, or was excessive, or maliciously and sadistically to cause harm). United States v. Cohn, 950 F.2d 784, 787 n.7 (4th Cir. 1991) for refusal of the officers to let go of the suspect after the suspect was handcuffed, conduct which could violate due process if it shocks the conscience, but Fourth Amendment reasonable use does not apply, not desired, 441 U.S. 170 (1999) and Austin v. Hamilton, 969 F.2d 1133, 1137 (10th Cir. 1994) (holding that in this theme action for federal agrarian for breach of duty during detention, Fourth Amendment applied prose arrest under the Fourteenth Amendment, in which substantive due process test applied) and Gonzalez v. Tijer, 775 F. Supp. 205, 206-01 (N.D. Ill. 1991) (holding that action against the police for use of force during plaintiff's 6-hour detention before arraignment, and holding that the Fourth Amendment substantive due process analysis is not applicable until after a suspect is formally charged). As can be seen from the above case descriptions, some courts that apply the Fourth Amendment's protection against excessive force beyond the arrest stage do not apply the substantive due process test (where the Fourth Amendment applies) and those ar rested by a judicial officer and analyzing vital when substantive due process applies). I argue that the policies supported by application of the Fourth Amendment to interrogation of unchallenged suspects apply equally to the interrogation of suspects prior to arraignment. See supra note 205.

110 One commentator suggested that the use of "gratuitously cruel" interrogation techniques that fail to cause physical injury leave their victim with an excessive force claim, not a self-incrimination claim. See Dripps, supra note 205, at 303. Professor Dripps advocates the elimination of the Self-Incrimination Clause from the Fifth Amendment, and the regulation of confessions under the Fourth Amendment, by requiring waivers from detainees before interrogation of a suspect commences. See id.

108 See Whitley, 475 U.S. at 324-25 (holding that infliction of gunshot wound to convicted prisoner, in the course of prison security measures taken by guards to quiet riot and rescue hostage, does not amount to cruel and unusual punishment even if that degree of force was unreasonable, only the unnecessary and wanton infliction of pain is actionable under $ 1983). In light of the overriding responsibility of prison officials to maintain the security of prisoners, victims, and guards, and the even greater potential for violence confrontation requiring fairly made decisions, the Eighth Court rejected the "shocks of conscience" standard set out in Estelle v. Gamble, 429 U.S. 97, 104 (1976) for providing medical attention to inmates and instead adopted the standard set out by Judge Friendly in Glick, 465 F.2d at 319. See Whitley, 475 U.S. at 319-21. That is, the Court required the prison to prove that the state of affairs were "outrageously and needlessly for the very purpose of causing harm." Id. at 321-21.

Pretrial detainees undergoing interrogation, by contrast, are already removed from the general prison population and thus pose little threat of rioting, smuggling contraband as weapons, or otherwise creating a disturbance. See 42 U.S. 570 (1999) (holding that maintaining institutional security and preserving internal order are essential goals that detainees must be allowed to achieve). This less intrusive standard is appropriate in Eighth Amendment analysis, according to the Court, because the Eighth Amendment, as opposed to the Fourth Amendment, applies only after the State has criminally convicted an individual. See Graham, 490 U.S. at 398 ("The less intrusive Eighth Amendment standard applies "only after the State has committed with the constitutional guarantees traditionally associated with criminal proceedings." (citation omitted)). See 441 U.S. at 553 (in noting that a "minor" or a "negligent" prisoner may be "punished in a way that is cruel and unusual under the Eighth Amendment," as in id., 441 U.S. 570 (1999), that prisoners' rights are subject to substantial restrictions as a result of their status, thus infringing upon their substantive due process right to "provide and First Amendment right to write letters\). Do not receive strict scrutiny, but rather are appropriate if there is a "compelling" reason for a "legitimate" purpose. Palmer, 480 U.S. at 522-23 (holding that the clemency or dismissal of many rights associated with incarceration is necessary to accommodate the institutional needs and objectives of prison facilities, particularly internal security and safety); Rhodes v. Chapman, 452 U.S. 339, 347-48 (1981) (finding that, as a function of punishing convicted persons, prison conditions are typically part of the State's legitimate restraints of liberty). While some restrictions upon the liberty interests of an individual accused of a crime are permissible to the extent that he is available for trial, such a detainee retains her right to be free of punishment. See, e.g., 414 U.S. at 536-37 (noting that although detention interferes with the accused's desire to live as comfortably as possible, confinement does not invalidate the conditions or restrictions of detention imposed by punishment). Gerstner v. Pugh, 420 U.S. 104, 114 (1975) (recognizing that the government
Assuming the Court adopts the reasoning above, it could mandate obedience to the dictates of Miranda by holding that any police action resulting in a confession that is subsequently determined to be actually coerced constitutes "excessive force." This has a number of advantages over a substantive due process test. First, the standard for determining whether a violation has occurred, the "objective reasonableness" standard, would eliminate inquiry into an officer's state of mind. Second, this standard would be easier for the plaintiff to prove. Finally, the Court prefers to rely on specific constitutional provisions rather than due process.

To fully enforce Miranda, however, the Court would also have to hold that all intentional violations of Miranda by state or local officials constitute excessive force within the meaning of the Fourth Amendment, regardless of whether those violations result in no confession or a voluntary one. In the latter situation, grafting an intentionality requirement will allow the officer who mistakenly fails to administer the warning properly (the "technical violator") to escape liability, while deterring those who intentionally attempt to circumvent the Court's rules of behavior. This standard would require the plaintiff to establish the officer's state of mind. Proving her intention to violate Miranda, however, would still be less onerous than proving that the officer acted sodetically with the

may potentially deter a person suspected of committing a crime prior to a formal adjudication of guilt. This makes sense in light of the fact that many interrogations occur after arrest but prior to arraignment. In such a situation, the suspect is closer in circumstances and presumptively in rights, to an ordinary citizen than a convicted offender.

To reach those instances where psychological pressures produce a coerced confession, the Court would need to override those cases holding that mere allusions of self-incrimination are not present actionable claims under [U.S.]; see McCafferty v. Lucas, 715 F.2d 145, 146 (5th Cir.) (holding that an example of those instances, a police officer's intentionally inflicted injury gives rise to a § 1983 claim), cert. denied, 464 U.S. 998 (1983). In making its decision, the Court will also have to consider this opinion as it relates to the courts to apply the Fourth Amendment in an interrogation setting. See Cooper, 921 F.2d 1520, 1530 (9th Cir. 1991), rev'd in part, 968 F.2d 1200 (9th Cir.); holding Fourth Amendment excessive force claim inapplicable "as little physical force was employed against Cooper in his arrest."); and, finally, in the same case, Cooper, 921 F.2d 1520 (9th Cir. 1991, rev'd in part), 968 F.2d 1200 (9th Cir.); holding that the Fourth Amendment excessive force claim inapplicable "as little physical force was employed against Cooper in his arrest." (Footnote 155)

664 This would of necessity include the requirement that the Self-Interrogation Clause apply at the station house as well as in the courtroom.

665 Dissenting in Michigan v. Tucker, Justice Douglas opined that "Miranda's purpose was not per se promulgation of judicially preferred standards for police interrogations, a function we are quite powerless to perform; the decision enunciated "constitutional standards for protection of the privilege against self-incrimination." 437 U.S. 455, 463-66 (1978) (quoting Miranda v. Arizona, 384 U.S. 436, 491 (1966) [Douglas, J., dissenting].) Douglas believed that if Miranda warnings were not required by the Constitution, the Court should not have required them, for if Miranda warnings function simply to punish officers rather than as a constitutional right of the defend- ant, then "the Court's action in adopting [them] sounds more like law-making than constraining the Constitution." At 465 (quoting Linkletter v. Walker, 381 U.S. 618, 645 (1965) [Black, J., dissenting]).

666 See Ogletree, supra note 58, at 1842 (stating that the per se exclusion of custodial statements made in the absence of counsel is preferable to the current Miranda warnings, and would better protect the Fifth Amendment privilege against self-incrimination); Scholtes, supra note 28, at 461 (arguing that the Miranda warnings are necessary to protect a suspect's constitutional rights and that "Miranda's safeguards deserve to be strengthened, not overruled").

667 This also raises the specter of Article III illegitimacy. See supra notes 58-59 and accompanying text (noting that several commentators have forcefully urged that the Court has no authority to overturn a state court criminal acquittal absent a federal constitutional violation).
violated in every case, unless the warnings are given. 199

While Schubert's argument eliminates the need to justify Miranda as a prophylactic rule, it depends upon the acceptance of a rather strained definition of compulsion. 200 Moreover, a number of additional problems come to mind. Initially, his theory may require the reversal of all cases that hold that a Miranda violation is not a constitutional one. Consequently, any statement obtained in violation of Miranda would be disallowed for purposes of impeachment, obtaining other leads, and so forth. Aside from potentially impeding the truth-seeking function of a trial, this practice may offer undue advantage to the defendant by requiring the prosecutor to reveal idly while the defendant escapes punishment by committing perjury. 201 Alternatively, it may be possible to allow statements taken in violation of Miranda to be used for impeachment by employing a balancing test. To be sure, the Court balances government action against individual liberty in certain areas of constitutional law.

An additional hurdle must be overcome before such an approach would permit a § 1983 action for a Miranda violation. Even if it is established that every unanswered statement is "compelled," such statements must still be introduced in "criminal proceedings." 202 The recontextualized Miranda doctrine could

99 See Schubert, supra note 28, at 445-46 ("[The Miranda] Court did not hold that a brief period of interrogation necessarily will involve compulsion."). In the Fifth Amendment context, compulsion means "pressure imposed for the purpose of discouraging the silence of a criminal suspect." Id. at 445 (emphasis omitted). In such a case the "pressure rather than its amelioration is significant. See Id. ""Con- tinued interrogation brings psychological pressure to bear for the specific purpose of overcoming the suspect's unwillingness to talk, and is therefore inherently compelling... . " Id at 446. Thus, one interpretation of Schubert's article is that, in essence, Miranda's notion of compulsion is not a presumption at all, but a logical and factual certainty.

For example, Schubert had pointed out that Miranda's 1966 Supreme Court decision, supra note 59, at 185-86 (arguing that Schubert's interpretation of the word "compelled" is implausible).

100 See Schubert, supra note 28 at 445-46 (holding that although the accused was questioned in violation of Miranda, his statements could be used to impeach his significant omission in the trial).

101 For example, the First Amendment protection of free speech can be abridged if the speaker has not furnished adequate justification. See, e.g., Dennis v. United States, 341 U.S. 490, 509 (1951) ("[T]he societal value of speech must, on occasion, be subjected to careful and critical considerations.").

102 See supra notes 85-118 and accompanying text (discussing the fact that the failure of police officers to give Miranda warnings does not deprive a suspect of his constitutional rights unless statements obtained during the interrogation are used against (or suspect at trial).
of its own making, absent a constitutional amendment. I believe Chief Justice Warren, whether consistently or not, was promulgating a controversial genre of constitutional law. Previous constitutional interpretation divided the "core" meaning of constitutional provisions, which meaning did not change over time and did not directly depend upon policy or empirical decisions. This alternative class of constitutional interpretation is more fluid. The remainder of this Article reflects my own conception of the Constitution.

Professor Monaghan first coined the phrase "constitutional common law" in 1975, noting that a surprising amount of what passes as authoritative constitutional "interpretation" is best understood as sifting of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress. I would modify Monaghan's theory and posit that constitutional common law is in fact required by the Federal Constitution in some instances, but this requirement is temporary and/or conditional. Some remedy or procedure is necessary to safeguard a constitutional provision, but the Constitution itself does not specify which remedies or procedures to utilize. Thus it becomes the Court's obligation under the Constitution to create the body of law necessary to guarantee that particular constitutional right against whatever danger it faces. The necessary or appropriate remedy have a self-executing force that not only permits but requires the courts to recognize remedially appropriate for their vindication.

have not been construed as constitutional amendments. I am using the term "constitutional amendment" to mean an amendment to the Federal Constitution adopted pursuant to the constitutional amendment process set forth in the Constitution.

dies and procedures may change with circumstances and Congress may provide alternative remedies and procedures of comparable effectiveness. This "constitutional common law" has the same status as "true" constitutional interpretation and as federal statutes and would thus be a proper basis for a § 1983 suit. In 1994, as in 1966, the Miranda warnings and the exclusion of statements taken in violation of these warnings are constitutionally required as part of the Fifth Amendment's self-incrimination privilege. These warnings may not be required in the future, as the Court has held that they are not constitutionally required.

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however, due to changed circumstances. For example, if the nature of custodial interrogation were ever to become less compelling (say, if police officers offered more suspects tea and crumpets instead of the threat and psychological coercion, or if every interrogation were videotaped),

conditions would then have changed such that the previous constitutional common-law procedure would be unnecessary. Likewise, if Congress instituted an effective alternative to the Miranda warnings, such as by enacting a statute requiring that defendants be counselled in every custodial interrogation, then, again, the warnings would no longer be required. Although the interrogation itself would remain equally intimidating, the Court, in assessing this new procedure, might find the congressional remedy adequate to protect the privilege and thus find the constitutional requirement satisfied. Just as the means of certain constitutional provisions may change over time, the conditions that inform these provisions may change as well. Naturally, one may ask where the Court derives the authority to create constitutional common law. Although there is certainly no federal general common law to supplant state rules of decision,

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there is a species of federal common law appropriate in cases of overriding federal interest, such as interstate and international disputes, disputes concerning the federal government of the United States, and admiralty cases. Moreover, inherent in the process of federal court decision-making is the need to create federal common law to fill the legislative gaps in federal statutes. Concerns of federalism and separation of powers are somewhat allayed by the fact that the Court is merely divining congressional purpose by looking directly to the words, structure, legislative history, and purpose of the statute, and because of the need for a uniform national rule of law.

A court has a similar duty to assess the constitutionality of state (declared substantive rules of common law).

[See Texas Indus., Inc. v. Radco Materials, Inc., 451 U.S. 640, 641 (1981)]; ("Federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes, maritime law, admiralty law, national security law, and federal tax law.") (citation omitted); see also Morgan v. States Marine Lines, 386 U.S. 377, 378 (1967) (allowing action for wrongful death to be brought in federal court under admiralty law); United States v. Smith, 356 U.S. 309, 313 (1958) ("[T]he scope of the act of state doctrine must be determined according to federal law."). [327 U.S. 257 (1946)]; see also United States v. Florida East Coast Railway Co., 365 U.S. 85, 89 (1961) (holding that the Court must fashion federal common law to resolve a dispute between the United States and a bank)."


Unfortunately, in the civil rights area the post-Warren Courts have used federal common law almost exclusively to limit the substantive scope of § 1983 and differentiate cases in which it would be inappropriate to allow such claims to proceed in federal court. See, e.g., Schweiker v. Chacko, 454 U.S. 225, 229-30 (1981) (holding that a private action for recovery of damages was barred under § 1983 in a tort suit brought by an injured party alleging a constitutional violation arising out of the wrongful termination of social welfare benefits because Congress had not intended, through its enactment of the 1984 Reform Act, to provide an adequate remedy under the Rehabilitation Act).

In 1981, the Court used the Equal Protection Clause to enforce a private right of action for violations of § 1983, holding that the Equal Protection Clause was violated by the refusal to grant an American Indian child a foster care placement with a white family. See United States v. Hall, 472 U.S. 29, 32 (1985). The Court in Upham v. Friends of the Earth, Inc., 488 U.S. 917, 918 (1989) (per curiam) (holding that a statute declaring that the Constitution of the United States is fundamental to the Constitution of the State of California is a constitutional violation under the U.S. Constitution). In 1990, the Court held that the Equal Protection Clause was violated by the refusal of the State of Montana to grant a marriage license to a same-sex couple.

and federal action in the cases before it. In a civil rights action in which a plaintiff alleges a constitutional violation, or in a criminal prosecution in which the government attempts to deprive an individual of constitutionally guaranteed liberties, the court must interpret how the Constitution limits the activities of those state and federal officials. To accomplish this, the Court must divine the Framers' purpose (if relying on strict constructionism) or the present meaning of the Constitution (if relying on judicial realism) by looking to the words, structure, and purpose of the Constitution.

This precisely the road that the Court travels when it creates federal common law in a statutory context.

There are numerous advantages to finding that constitutional common law is constitutionally required. First, it answers the Article III legitimacy question. The Court would decide a case "arising under this Constitution" in refusing to incarcerate an individual whose conviction is based upon a Fifth Amendment violation, and could, pursuant to the Supremacy Clause, overturn state convictions so based. Such a finding would also allow a plaintiff to bring a § 1983 action based upon a violation of the constitutional common-law prophylactic rule.

Likewise, there are many advantages to using constitutional common law rather than constitutional interpretation. Built into these advantages are automatic limits on the dangers of expanding the Court's role in this manner. Initially, the use of constitutional common law would ensure that constitutionally guaranteed rights would have the same contours regardless of the state in which a citizen lived. Without either a constitutional interpretation of the Fifth Amendment or constitutional common law requiring Miranda's exclusionary rule, the rule is illegitimate (as applied to state courts) under Article III, and a citizen should receive no protection from it. If, however, the Constitution does require some deterrence mechanism, but the Court cannot fashion constitutional common law, then the Court is limited to a case-by-case determination of whether the state in which the defendant resides has provided a relief mechanism. Again, the protection would vary among citizens of different states. A related advantage to using constitutional common law is that by springing from the Constitution itself, it protects individuals rights in a principled manner. This quality preserves judicial integrity by shielding justices from the criticism that they are merely implementing their own versions of the social good and by giving their rulings the force of law they deserve.

There are, of course, federalism concerns with prescribing detailed rules for state actors to follow. The Court has already determined, however, that to dispel the coercion inherent in custodial interrogations, law enforcement officials must be given a concrete rule to follow (the warnings), and suspects must be given a remedy to deter violations of the rule (the exclusionary rule).

Constitutional common law, via the Supremacy Clause, trump any conflicting state laws or practices and is made necessary by the state's own failure to control its public officials. Furthermore, the states will have a voice in determining these prophylactic rules through their representation in Congress. Because the rules founded in constitutional common law are not necessarily the only rules capable of safeguarding a particular constitutional provision, Congress can change these rules by offering adequate alternative remedies.

If the Miranda warnings and attendant exclusionary rule were based on traditional constitutional interpretation, then they could never have been changed absent a constitutional amendment or express overruling of Miranda.

Finally, in defining the scope of the constitutional common law necessary to protect the privilege, the Court can continue to admit inadvertently unwarned or defectively warned statements to impeach and gather new leads, as such use will not encourage officers to violate Miranda or conduct inherently compelling interrogations. This same constitutional common law, however, can mandate the exclusion—even for impeachment purposes—of any statement made after an officer has deliberately ignored a suspect's requests for silence or counsel. Such exclusion is necessary to compel officers to deliver the warnings and to counteract the otherwise compelling nature of custodial interrogation by someone.

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66 See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

67 This feature violates any separation of powers concerns. See Moynahan, supra note 16, at 25, 56-58 ("Questioning the legitimacy of an individual's liberty on a common law basis triggers an important shift in the political process. The Court, in effect, opens a dialogue with Congress, but one in which the factor of inertia is now on the side of individual liberties."); footnote omitted). But see Schrock & Welsh, supra note 29, at 1350-55 (arguing that Moynahan's subconstitutional common law may precipitate a clash of wills between the Court and a Congress that wishes to control individual liberties, and that the definitional problems in distinguishing constitutional from subconstitutional pronouncements may increase the frequency of this clash).
who clearly does not intend to honor a suspect's rights. Likewise, the Court can allow a § 1983 action when law enforcement officials intentionally ignore Miranda requests for silence or counsel, again because there is a constitutional violation to be deterred.398

CONCLUSION

Those scholars who believe that the Miranda decision was an unwise one are disturbed primarily by the ostensible broadening of the rights of criminal defendants and by the legislative rather than judicial character of the opinion. Such scholars may or may not be appeased or reassured by my attempt to tie that decision more closely to its constitutional moorings. But even those who applauded the deconstitutionalization of Miranda ought to deplore a system in which courts interpret the law in one manner, yet federal and state law enforcement officials ignore this interpretation and instead substitute their own.

Presently, police officers are allowed to apply "cost-benefit" analysis to constitutional or nonconstitutional adjudication, deciding whether to obey certain judge-made rules, or whether a net benefit inheres in breaking these rules and paying the price. By deconstitutionalizing Miranda and holding that no Fifth Amendment violation can occur outside of a courtroom, important decisions concerning the content of citizens' civil rights have been shifted from the judiciary to law enforcement personnel. Courts, legislatures, and the general public should recognize that the United States Supreme Court has chipped away at Miranda to the point that it can no longer be called a constitutional requirement and therefore cannot support a § 1983 action. Thus, the extent to which the dictates of Miranda remain in force depends wholly upon the opinions and beliefs of law enforcement officials, as well as the methods they employ in weighing the competing interests of evidence gathering versus freedom from government intrusion. Regardless of whether the fault lies with law enforcement for stretching the limits of court

398 The Court has stated that deterrence of constitutional violations is one of the goals of § 1983. See Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 316 (1986). ("...Congress intended that awards under § 1983 should deter the deprivation of constitutional rights...") (quoting Carey v. Piphus, 435 U.S. 247, 256 (1978)). The interrelationship concept would be consistent with even § 1983 cases requiring "irrational state action and is justified by the purpose of the civil rights statute to curb abusive government practices."

mandates in this area, or with the courts for failing to enforce their mandates, the situation is an intolerable one.

The various proposals in this Article solve the obstacles to enforcement. Through the use of constitutional common law, the Miranda decision can continue to supply guidance to police officers conducting custodial interrogations, protect the privilege against self-incrimination, conserve resources by providing evidentiary presumptions for judges, and provide a basis for aggrieved plaintiffs to sue pursuant to the civil rights statute. Without some method for enforcement, we have, in effect, repealed the Self-Incrimination Clause sub silencio. We are then doomed to return to those barbaric means of ascertaining truth that the Court has sought to outlaw.